IN THE SUPREME COURT OF THE UNITED STATES.

Ex parte

AMERICAN STEEL BARREL COMPANY and ELIZABETH C. SEAMAN, Petitioners.

No. 14 Orig.

Comes now the American Steel Barrel Company and Elizabeth C. Seaman, Petitioners, by their counsel, and respectfully move this honorable Court for leave to file a petition for writ of mandamus, as in said petition prayed.

ALDIS B. BROWNE,
Attorney for Petitioners.

JOHN C. SPOONER,
ALDIS B. BROWNE,
Of Counsel.

Supreme Court of the United States. 1

OCTOBER TERM, 1912.

Ex-Parte, AMERICAN STEEL BARREL COMPANY and ELIZABETH C. SEAMAN,
Petitioners.

On consideration of the petition of American Steel Barrel Company and of Elizabeth C. Seaman, 2

It is now hereby ordered by the court that cause be shown by Hon. Thomas I. Chatfield, District Judge of the United States for the Eastern District of New York and Hon. E. Henry Lacombe, Senior Circuit Judge of the United States, Second Circuit, and Hon. Julius M. Mayer, District Judge of the United States for the Southern District of New York, before this court at Washington, on the day of February, 1913, at o'clock, in the noon of that day, or as soon thereafter as counsel can be heard, why a writ of mandamus should not be granted as prayed for in said petition. 3

Dated Washington, February , 1913.

4 IN THE

SUPREME COURT OF THE UNITED STATES.

Ex parte AMERICAN STEEL BARREL COMPANY and ELIZABETH C. SEAMAN,
Petitioners.

The above named petitioners, American Steel Barrel Company, a corporation of the State of New
5 York, and Elizabeth C. Seaman, a citizen of the United States and a resident of the State of New York, move the Honorables the Judges of the Supreme Court of the United States for a Rule on Hon. Thomas I. Chatfield, District Judge of the United States for the Eastern District of New York, Hon. E. Henry Lacombe, Senior Circuit Judge of the Second Circuit, and Hon. Julius M. Mayer, District Judge of the United States for the Southern District of New York, to show cause why a writ of mandamus should not be issued, commanding said Hon. Thomas I. Chatfield, District Judge of the United States for the Eastern District
6 of New York, to exercise jurisdiction and proceed in the matter of Iron Clad Manufacturing Company, bankrupt, generally and especially in the extension proceedings therein wherein the said Hon. Thomas I. Chatfield made and filed his opinion in the office of the Clerk of the District Court of the United States for the Eastern District of New York on or about the 15th day of March, 1912, and to sign and enter an order on said decision, and thereupon to proceed to final determination in said matter in accordance with law; and directing the vacating and setting aside of the order of said Hon. E. Henry Lacombe, Senior Circuit Judge as aforesaid, dated

April 2nd, 1912, designating and appointing said 7
Hon. Julius M. Mayer, District Judge of the United States for the Southern District of New York, to have and exercise in the above entitled proceeding within the Eastern District of New York, the same powers that are now vested in the District Judges of said Eastern District or either of them, and quashing, vacating and setting aside all proceedings in said matter of Iron Clad Manufacturing Company bankrupt, extension proceedings so-called, had before said Hon. Julius M. Mayer, District Judge as aforesaid subsequent to the said order of said Hon. E. Henry Lacombe, and directing the exercise of jurisdiction in said matter of 8
Iron Clad Manufacturing Company, and all proceedings incidental thereto and involved therein by the District Judges of the Eastern District of New York, and especially commanding said Hon. Thomas I. Chatfield to exercise the jurisdiction thereof which he had and was exercising on and prior to the 29th day of March, 1912;

And why the petitioners should not have the relief prayed for and such other and further relief in the premises as may be just.

Washington, D. C., February 22d, 1913.

A. B. BROWNE,
Attorney for Petitioner. 9

JOHN C. SPOONER,
A. B. BROWNE,
Of Counsel.

10 IN THE

SUPREME COURT OF THE UNITED STATES.

Ex parte AMERICAN STEEL BARREL COMPANY and ELIZABETH C. SEAMAN,

Petitioners.

TO THE HONORABLES THE JUDGES OF THE SUPREME
11 COURT OF THE UNITED STATES:

THE PETITION OF AMERICAN STEEL BARREL COMPANY AND OF ELIZABETH C. SEAMAN RESPECTFULLY SHOWS AND ALLEGES:

FIRST: That your petitioner, American Steel Barrel Company, is a corporation of the State of New York, duly organized under and pursuant to the laws of said State, on or about the 16th day of February, 1905; and that your petitioner Elizabeth C. Seaman is a citizen of the United States and of the State of New York, and a resident of the City, County and State of New York.

12 SECOND: That Iron Clad Manufacturing Company is a corporation organized and existing pursuant to the laws of the State of New York, having its principal place of business and residence within the Eastern District of the State of New York, to wit, in the Borough of Brooklyn, Kings County, State of New York.

THIRD: That the said American Steel Barrel Company, one of your petitioners, has its principal place of business in the County of Kings, State of New York, and is and was a resident of said Eastern District of the State of New York.

FOURTH: That on or about the 23rd day of May, 1911, a proceeding was commenced before the judges of the District Court of the United States for the Eastern District of New York against Iron Clad Manufacturing Company, jurisdiction over which was then rightly taken and continued to be exercised by the said District judges of said Eastern District, and wherein such proceedings were had that heretofore and on or about the 2nd day of December, 1911, the Iron Clad Manufacturing Company was adjudicated a bankrupt by a judgment or decree rendered by Hon. Thomas I. Chatfield after trial by jury, in the District Court of the United States for the said Eastern District of New York.

FIFTH: That theretofore and on or about the 20th day of June, 1911, certain creditors of said Iron Clad Manufacturing Company filed a petition before the Hon. Thomas I. Chatfield, District Judge of the United States for the Eastern District of New York, praying that the receivership in bankruptcy of the Iron Clad Manufacturing Company, said bankrupt, be extended over and ordered to include, the capital stock, property and assets of your petitioner, American Steel Barrel Company and for the purpose of summarily acquiring its property assets and capital stock of your petitioner American Steel Barrel Company.

SIXTH: That the said petition and application came before the said Hon. Thomas I. Chatfield, said District Judge, and jurisdiction therein and thereover was thereupon duly had, held and retained by said District Judge, Hon. Thomas I. Chatfield.

SEVENTH: That thereupon and thereafter such proceedings were had on said petition or application, that on or about the 15th day of March, 1912,

16 said Hon. Thomas I. Chatfield, District Judge as aforesaid, made and filed his opinion or decision, a true copy of which is found reported in 194 Fed. Rep., page 906.

EIGHTH: Thereafter the petitioning creditors noticed a motion returnable on March 29th, 1912, before Hon. Van Vechten Veeder, one of the District Judges of the United States for the Eastern District of New York to re-open the application to extend said receivership, and for a direction that the petitioners be afforded an opportunity to take testimony, etc., and for a postponement of the
17 entry of any order or decree upon the application decided by the said Hon. Thomas I. Chatfield on the 15th day of March, 1912, "and for other relief", which said motion was referred by the said Judge Veeder to the said Judge Chatfield, but that instead of appearing before the said Judge Chatfield for the purpose of arguing said motion, the petitioning creditors' counsel then and there withdrew and forthwith did and performed the said matters and things hereinafter set forth.

NINTH: That on or about the 29th day of March, 1912, there was presented personally to said Hon.
18 Thomas I. Chatfield, said District Judge of the United States for the said Eastern District of New York, an affidavit of one Thatcher M. Brown, verified March 29th, 1912, a true copy of which affidavit your petitioners hereto annex (marked Exhibit A), and make a part of this petition; and a certain alleged certificate dated March 29, 1912, signed by Charles A. Riegelman, Edwin T. Rice and John A. Garver, a true copy of which certificate (marked Exhibit B) your petitioners hereunto annex and make a part of this petition; that said Hon. Thomas I. Chatfield, said District Judge, thereupon caused the said affidavit and certificate aforesaid to be

filed in the office of the Clerk of the United States 19
District Court for the Eastern District of New York, and thereupon said Hon. Thomas I. Chatfield, said District Judge, prepared and signed a paper purporting to be a certificate, a true copy of which your petitioners hereunto annex (marked Exhibit C), and make a part of this petition; and thereupon the Clerk of the District Court of the United States for the Eastern District of New York did certify to the Hon. E. Henry Lacombe, Senior Circuit Judge for the Second Circuit, the fact of the filing of said affidavit and certificate and the said certificate of said Hon. Thomas I. Chatfield above described, which Clerk's certificate is here- 20
unto annexed and made a part of this petition and marked Exhibit D; and thereupon the Hon. E. Henry Lacombe, said Senior Circuit Judge, did, on or about the 2nd day of April, 1912, make and cause to be filed in the Clerk's Office of the United States District Court for the Eastern District of New York a certain order, a true copy of which your petitioners hereunto annex and mark Exhibit E and make a part of this petition, and wherein and whereby said Hon. E. Henry Lacombe, said Senior Circuit Judge, did order as follows, to wit:

> "I, E. Henry Lacombe, Senior Circuit
> Judge of the Second Circuit, under the au- 21
> thority conferred by Section 21 of the Judicial Code of the United States, do hereby designate and appoint the Hon. Julius M. Mayer, District Judge of the Southern District of New York, to have and exercise in the above-entitled proceeding within the Eastern District of New York, the same powers that are now vested in the District Judges of said Eastern District, or either of them."

22 TENTH: That said Hon. Thomas I. Chatfield, on or about said 29th day of March, 1912, protesting that he was without bias or prejudice, but, on the contrary, might call in question many of the statements or controvert many of the allegations contained in said alleged affidavit and certificate of bias or prejudice, and further certifying that if any disqualification existed it was also present when the said Court directed the verdict of adjudication and made other decisions in favor of said creditors and upheld the finding of the special commissioner as to charges of contempt against the individual respondent herein, but that the intent of
23 Section 21 of the Federal Judicial Code was to transfer the case without reference to the merits of the charged bias, and in order that the application of the creditors might be considered as speedily as possible by such other judge as might be designated, did decline to proceed further in said proceedings in which he had so rendered and filed his opinion or decision, and has ever since that day declined so to proceed therein, so that your petitioners have not been able to obtain the signature and entry of any order on his said opinion or decision rendered as aforesaid, and your petitioners further allege and show that from and after the date of the said
24 certificate of said Hon. Thomas I. Chatfield, District Judge as aforesaid, said Thomas I. Chatfield, said District Judge, did cease to entertain any further jurisdiction whatever of any matter arising from or connected with the said proceeding known as the "Iron-Clad Manufacturing Company, bankrupt."

ELEVENTH: That thereupon the said petitioning creditors, who had by petition or application before the Hon. Thomas I. Chatfield, District Judge, made a motion, application or petition and instituted thereby a proceeding to extend the receiver-

ship or trusteeship of Iron Clad Manufacturing 25
Company, bankrupt, over the capital stock, property and assets of your petitioner, American Steel Barrel Company, did forthwith, on or about the 11th day of April, 1912, bring before said Hon. Julius M. Mayer, District Judge as aforesaid, said application to re-open the proceedings brought on and the issues raised by the amended supplemental petition of Thatcher M. Brown and others, verified December 15, 1911, and the answers of the American Steel Barrel Company, and Elizabeth C. Seaman, your petitioners, verified January 9th, 1912, and joined in by George Wheelock, by affidavit verified December 30th, 1911, 26
and to take evidence and proof of the issues so raised, and which said proceeding and the issues raised therein were the same proceeding and issues which had been heard and determined by the said Thomas I. Chatfield, District Judge as hereinbefore set forth, and upon which he made and filed his said opinion, published as aforesaid, in 194 Fed. Rep., page 906; and that thereupon the said Hon. Julius M. Mayer did, by an order dated April 22, 1912, refer it to one Philip J. McCook, Esq., as Special Master, to take proofs of the petitioners and respondents in said proceeding and report the same to the Court, namely, to said Hon. Julius 27
M. Mayer, District Judge as aforesaid, and did in and by said order restrain and enjoin the respondents in said proceedings, to wit, your petitioners, from the entry of any order upon the said opinion or decision of Hon. Thomas I. Chatfield, dated and filed on or about March 15th, 1912, as hereinbefore recited and referred to. And your petitioners annex a true copy of said order (marked Exhibit F) of said Hon. Julius M. Mayer, District Judge as aforesaid, to this their petition and make the same a part thereof.

And your petitioners further show and allege

28 that proceedings In the Matter of the Iron Clad Manufacturing Company, bankrupt, including the extension proceedings, so-called, were had before the said Hon. Thomas I. Chatfield, as one of the Judges of the United States District Court for the Eastern District of New York, on the following dates, viz: June 5th, 6th and 30th, 1911; August 11th, 1911; October 6th, 13th, 20th, 21st, 23rd, 25th, 26th, 27th and 28th, 1911; November 1st, 3rd, 13th, 14th, 15th, 16th, 17th, 20th, 21st, 22nd and 23rd, 1911; December 2nd (upon which date the Iron Clad Manufacturing Company was adjudicated a bankrupt), December 15th, 21st, 29th, 1911; March
29 1st, 8th, 15th, 27th, 1912.

And your petitioners further show and allege that proceedings, In the Matter of the Iron Clad Manufacturing Company, bankrupt, were had before the said Hon. Van Vechten Veeder, as one of the Judges of the United States District Court for the Eastern District of New York, on the following dates, viz: July 7th, 12th, 17th, 26th, 31st, 1911; August 24th and 30th, 1911; November 24th, 1911; January 3rd and 19th, 1912, February 7th and 17th, 1912; March 29th (motion to re-open extension proceedings, which was referred to Chatfield, *J.*), 1912.

That since the 2nd day of April, 1912, all pro-
30 ceedings In the Matter of Iron Clad Manufacturing Company, bankrupt, including said extension proceedings, so-called, have been conducted before Hon. Julius M. Mayer, aforesaid.

TWELFTH: And your petitioners further show that by reason of the foregoing facts the jurisdiction of said Judges of the United States District Court for the Eastern District of New York and particularly of said Hon. Thomas I. Chatfield has been unlawfully taken and exercised without authority of law in the said proceeding, and your

petitioners have been illegally restrained from entering an order upon his said decision, and the said Hon. Thomas I. Chatfield has without warrant of law declined further to exercise jurisdiction in the said proceeding which he had decided, and that your petitioners have been and are being thereby compelled to defend the same proceeding over again at great expense and cost before another District Judge, to wit, Hon. Julius M. Mayer, whereby the rights of your petitioners, under the laws of the United States, have been violated and annulled, and the property of your petitioners caused to be wasted and imperiled. 31

32

THIRTEENTH: And your petitioners respectfully allege and show that Section 21 of the Federal Judicial Code is unconstitutional and void if it allows and permits a party to an action or proceeding to divest and oust a United States District Judge duly qualified, appointed and sitting from having and exercising lawful jurisdiction over a cause or proceeding without providing for any hearing of the opposite party or parties, without providing for any hearing on the part of said Judge or any other Judge or court of the charge of bias and prejudice against the said sitting Judge; and that said Section 21 is unconstitutional and void for other reasons and has been so adjudicated by the Circuit Court of the United States, Fifth Circuit. 33

And your petitioners further respectfully allege that the affidavit of said Thatcher M. Brown and the alleged certificate of Messrs. Riegelman, Rice and Garver attached thereto, were not filed within the time fixed by said Section 21 of the Federal Judicial Code, but were filed and delivered to said Hon. Thomas I. Chatfield only after the said Hon. Thomas I. Chatfield had exercised and retained jurisdiction for about nine months, to wit, since June 5th, 1911, in the said proceedings in the matter of

the Iron Clad Manufacturing Company, bankrupt, and only after the said Hon. Thomas I. Chatfield had decided the said extension proceeding adversely to said petitioning creditors and had made and filed his said opinion and was about to enter an order carrying his decision into effect.

And your petitioners further allege that the said affidavit of Thatcher M. Brown did not contain and set forth any facts showing any bias or prejudice against the petitioning creditors, or of the trustee, on the part of the said Hon. Thomas I. Chatfield, and that, on the contrary, the said Hon. Thomas I. Chatfield had and evinced no prejudice or bias whatever against the said parties, but had made various decisions in favor of said petitioning creditors, including the adjudication after contest and trial by jury that the Iron Clad Manufacturing Company was a bankrupt at the time of the filing of the petition against it.

And your petitioners further allege that the alleged causes set forth in the affidavit of said Thatcher M. Brown explaining why the said affidavit and certificate of bias and prejudice had not been filed and presented within the time fixed and stated in said Section 21 of the said Federal Judicial Code did not constitute good and sufficient, or, indeed, any cause for their failure to present and file said affidavit and certificate of bias within the said statutory time, but, on the contrary, set forth the following: "the reason why this affidavit was not filed ten days prior to the commencement of the said April Term, is that there were and are a number of matters pending before Judge Chatfield in said Bankrupt Estate of great importance to the Trustee and to the Creditors of said Bankrupt Corporation, as to which it had been hoped that action would be taken which would expedite the administration of the Bankrupt's estate. The said matters are, however, by reason of the con-

fused state of the court records and the forms of order entered and proposed to be entered in relation thereto, hopelessly involved, and it is of the utmost importance to the creditors and the Trustee that the confusion in which the affairs of the Bankrupt have become involved through the action or inaction of the Honorable Thomas I. Chatfield, should be cleared up." 37

FOURTEENTH: And your petitioners further allege that they are informed and verily believe and therefore allege that the entire proceedings whereby the said Hon. Thomas I. Chatfield was prevented from further exercising his jurisdiction and whereby your petitioners were prevented from entering and filing an order upon his decision, and whereby the said Hon. Thomas I. Chatfield did thereupon decline further to entertain jurisdiction of said proceedings are wholly unconstitutional, illegal and void. 38

FIFTEENTH: And your petitioners further allege that they were informed by their then attorney, James A. Allen, Esq., and believe, that the said James A. Allen, Esq., applied to the said Hon. E. Henry Lacombe, Circuit Judge of the Second Circuit, for an Order to Show Cause why the said affidavit and certificate of designation of the Hon. Julius Mayer, should not be vacated and set aside but that said Hon. E. Henry Lacombe declined to grant such an order and that the said James A. Allen, Esq., thereupon requested the said Hon. E. Henry Lacombe to designate a day upon which a motion might be made to vacate and set aside the said order and certificate of designation but that the said Hon. E. Henry Lacombe declined to designate such a date and your petitioners further allege that the said James A. Allen, Esq., never advised your petitioners that your petitioners had a right 39

40 to apply to the Honorable Justices of the Supreme Court of the United States for a Writ of Mandamus, such as is herein applied for, or any similar remedy, and that it was not until on or about the 17th day of January, 1913, that your petitioners were able to obtain the counsel and advice of Louis O. Van Doren, Esq., a member of the New York Bar, whom your petitioners have since said date last above-mentioned sought to have substituted in said proceedings as the attorney of record for your petitioners in the place and stead of James A. Allen, Esq., and that said motion has been granted and the order thereon has been submitted and is now wait-
41 ing settlement and signature. That upon looking into and examining the status of all the proceedings heretofore had herein and after giving careful study and consideration thereto, the said Louis O. Van Doren, Esq., did advise your petitioners of their right to make the application hereby presented and it was not until then that your petitioners knew or had been advised of such right.

SIXTEENTH: Your petitioners further allege that the extension proceedings, so-called, now being conducted before Hon. Julius M. Mayer, District Judge, and before said Philip J. McCook, as Special Master, are a re-opening and re-hearing or
42 renewal of the extension proceedings conducted before said Hon. Thomas I. Chatfield and in which said Judge Chatfield made his decision, and your petitioners allege that it is a violation of their rights to prevent them from entering an order upon the decision of Judge Chatfield and to prevent Judge Chatfield from the further consideration of the case and from further jurisdiction therein and thereover, and that it is contrary to law and to the rights of your petitioners to cause the same proceedings to be tried over again before another District Judge as is now being done, and that the said Hon. Thomas I. Chatfield, District Judge as aforesaid, had on March 29th, 1912, and ever since has rightfully had, jurisdiction over the said proceed-

ing, and that by the proceedings hereinbefore re- 43
cited the said petitioning creditors have secured, practically, a new trial of the same proceeding, and, practically, a review of judicial action therein without notice to your petitioners, without complying with the rules and statutes of the courts and without right in law or equity.

WHEREFORE your petitioners pray this honorable Court for a Rule on Hon. Thomas I. Chatfield, District Judge of the United States for the Eastern District of New York, Hon. E. Henry Lacombe, Senior Circuit Judge of the Second Circuit, and Hon. Julius M. Mayer, District Judge of 44
the United States for the Southern District of New York, to show cause why a writ of mandamus should not be issued by the Court, commanding said Hon. Thomas I. Chatfield, District Judge of the United States for the Eastern District of New York, to resume jurisdiction and proceed in the matter of Iron Clad Manufacturing Company bankrupt generally and especially in the extension proceedings therein, wherein the said Hon. Thomas I. Chatfield made and filed his opinion in the office of the Clerk of the District Court of the United States for the Eastern District of New York on or about the 15th day of March, 1912, and to sign and enter 45
an order on said decision, and thereupon to proceed to final determination in said matter in accordance with law; and directing the vacating and setting aside of the order of said Hon. E. Henry Lacombe, Senior Circuit Judge as aforesaid, dated April 2nd, 1912, designating and appointing said Hon. Julius M. Mayer, District Judge of the United States for the Southern District of New York, to have and exercise in the above-entitled proceeding within the Eastern District of New York, the same powers that are now vested in the District Judges of said Eastern District, or either of them, and quashing, vacating and setting aside all proceed-

46 ings in said matter of Iron Clad Manufacturing Company bankrupt, extension proceedings so-called, had before said Hon. Julius M. Mayer, District Judge as aforesaid subsequent to the said order of said Hon. E. Henry Lacombe, and directing the exercise of jurisdiction in said matter of Iron Clad Manufacturing Company, and all proceedings incidental thereto and involved therein by the District Judges of the Eastern District of New York, and especially commanding said Hon. Thomas I. Chatfield to exercise the jurisdiction thereof which he had and was exercising on and prior to the 29th day of March, 1912; and your said
47 petitioners further pray that this honorable Court will grant to your petitioners such other and further relief, or both, in the premises as may be just.

And your petitioners will ever pray.

Dated New York, February 22nd, 1913.

AMERICAN STEEL BARREL COMPANY,

By ELIZABETH COCHRANE SEAMAN,

Prest.,

ELIZABETH COCHRANE SEAMAN,

Petitioners.

A. B. BROWNE,
Atty. for Petitioner.

48

JOHN C. SPOONER,
A. B. BROWNE,
Of Counsel.

STATE OF NEW YORK,
City and County of New York, } ss.:

ELIZABETH C. SEAMAN, being duly sworn, says, that she is President of American Steel Barrel Company, one of the petitioners herein, and individually is the other petitioner herein; that she has read the foregoing petition and knows the contents thereof and that the same is true of her own knowl-

edge, except as to the matters therein stated to be 49
alleged upon information and belief, and that as to those matters she believes it to be true.

That the reason why this petition is not verified by the American Steel Barrel Company, one of the petitioners, is because the said petitioner, American Steel Barrel Company, is a corporation and this deponent is President of the same.

ELIZABETH COCHRANE SEAMAN.

Sworn to before me this 22d day of February, 1913.

CHARLES E. RAMIREZ,
Notary Public,
N. Y. County. 50

Exhibit "A."

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

IN THE MATTER OF IRON CLAD MANUFACTURING COMPANY, Adjudged Bankrupt.	No. 4374.

51

SOUTHERN DISTRICT OF NEW YORK, County of New York, ss.:

THATCHER M. BROWN, being duly sworn, says:

I. I am a member of the firm of Brown Brothers & Company, and joined with the Seaboard Coal Company and Oscar Unz as creditors of the Iron Clad Manufacturing Company in filing a petition

52 in this Court on May 23rd, 1911, to have said corporation adjudged bankrupt.

II. The attorneys for the petitioning creditors were and are the firm of Whitridge, Butler & Rice, of No. 59 Wall Street, New York.

III. The Iron Clad Manufacturing Company was and is a corporation organized under the laws of the State of New York, with an issued capital stock of $310,000. For at least six years prior to the filing of the petition in bankruptcy herein the said corporation had been owned and managed by
53 Elizabeth C. Seaman, its President and Treasurer, who owned all of its capital stock, and who held in her own name 3,096 shares out of a total issue of 3,100 shares.

IV. My firm of Brown Brothers & Company are parties to this proceeding as petitioning creditors, and as creditors having a claim against the bankrupt corporation in the sum of about Fifty Three Thousand Dollars, and desire to make and file an affidavit under Section 21 of the Federal Judicial Code, that the Hon. Thomas I. Chatfield, Judge of the District Court of the United States for the
54 Eastern District of New York, before whom proceedings affecting the said bankrupt corporation and the administration of the bankrupt's estate are to be tried or heard, has a personal bias against the firm of Brown Brothers & Company and the other petitioning creditors, and in favor of Elizabeth C. Seaman, the opposite party to the proceeding, and deponent states that the facts and reasons for the belief that such prejudice exists are as follows:

V. Upon the filing of the petition in bankruptcy herein on May 23rd, 1911, Appleton L. Clark, an attorney and counsellor at law of high standing,

was appointed Receiver of the Iron Clad Manufacturing Company by an order made by the Hon. Van Vechten Veeder, a Judge of this Court. Said Receiver duly qualified his bond, and immediately entered upon the discharge of his duties. 55

VI. The property of the bankrupt corporation consisted of an extensive manufacturing plant situated on Cook, Varet and White Streets, and Evergreen, Bushwick and Flushing Avenues, in the Borough of Brooklyn. At the time of the appointment of said Receiver the sole officer of the Iron Clad Manufacturing Company was Elizabeth C. Seaman, who was advised by her attorney, James A. Allen, Esq., 56 of the appointment of the Receiver on the afternoon of May 23rd, 1911. The said Elizabeth C. Seaman, at the time of receiving such notice was at the plant of the bankrupt corporation, and as I am informed, and as has since been found by this Court, the said Elizabeth C. Seaman was at that time engaged in removing property and records of the bankrupt corporation from its premises, and continued the work of such removal and supervising such removal after notice of the appointment of the Receiver had been given to her.

VII. The Receiver in due course, on May 24th, 57 1911, endeavored to obtain possession of all of the real estate standing in the name of the bankrupt corporation, and of all of its other property and assets, but the said Elizabeth C. Seaman refused to permit the said Receiver to have access to a considerable tract of real estate, title to which stood in the name of the Iron Clad Manufacturing Company, but which was claimed by the said Elizabeth C. Seaman to be in the possession of the American Steel Barrel Company, a corporation of the State of New York, all the capital stock of which, save the qualifying shares of directors, *also stood in*

58 *Mrs. Seaman's name,* and of which company she was also the president and treasurer. The plant and property operated by the American Steel Barrel Company was immediately adjacent to the property of the Iron Clad Manufacturing Company, and received all of its power from the power plant of the Iron Clad Manufacturing Company.

VIII. At the time the Receiver was appointed, the Iron Clad Company had practically shut down. It had no quick assets save a few hundred dollars on deposit in the bank, and a small amount in notes and accounts receivable. The cash was insufficient
59 to meet the pay rolls then due. The manufacturing plant was subject to a first mortgage of $75,000 and to the lien of a trust deed securing an issue of bonds of the Iron Clad Manufacturing Company aggregating $600,000, of which about $525,000 were issued and outstanding, the remaining $75,000 having been reserved by the trustee, the Guardian Trust Company, to provide for the first mortgage. Judgments had been recovered against the Iron Clad Manufacturing Company, and a number of executions were outstanding in the hands of the Sheriff of the County of Kings. The claims of the creditors, other than the amounts due upon the
60 bonds, aggregating about $650,000. The only business of any magnitude then being conducted was in the name of the American Steel Barrel Company.

IX. The Receiver was unable to operate the plant of the Iron Clad Manufacturing Company for lack of materials, supplies and cash resources with which to meet pay rolls, and, after a careful investigation, determined, with the approval of the petitioning creditors, to shut down the power plant, thereby saving expense to the bankrupt estate, and reducing the fire hazard. The property of the bankrupt corporation was insured against fire for only

a small amount, and it was found impossible to 61
obtain an adequate amount of fire insurance because of the bad reputation of the corporation, although constant and repeated efforts were made through brokers to obtain increased fire insurance.

X. After the Receiver had shut down the power plant, which was being operated solely for the benefit of the American Steel Barrel Company, an application was made by Elizabeth C. Seaman to this Court, upon a petition verified by her as President of the American Steel Barrel Company, for an order directing the Receiver of the Iron Clad Manufacturing Company to operate the power plant of the bankrupt corporation for the benefit of the 62
Steel Barrel Company. This application was opposed by the Receiver, the petitioning creditors and their counsel, before the Hon. Thomas I. Chatfield, in June, 1911. Against such opposition, however, and solely in the interest of the said Elizabeth C. Seaman, as President of the American Steel Barrel Company, an order was made by the Hon. Thomas I. Chatfield, directing the Receiver of the Iron Clad Manufacturing Company to continue to operate the power plant for the sole benefit of the American Steel Barrel Company. The only requirement was the deposit of the sum of $500 with the Clerk of the Court to protect the Receiver, and this was sub- 63
sequently increased to an aggregate amount of $1,000. The operation of the power plant was continued under the order so made by the Hon Thomas I. Chatfield for more than six weeks, and in order to obtain payment therefor the creditors have been obliged to institute a proceeding which is now pending before Robert F. Tilney, Esq., Referee, to have the amount of the payment to be made to the bankrupt estate ascertained. This application has been opposed by the said Elizabeth C. Seaman, and any substantial and adequate payment has been refused by the said Elizabeth C. Seaman.

64 XI. After the filing of the petition in bankruptcy, an order was granted for the examination of the said Elizabeth C. Seaman, under Section 21a of the Bankruptcy Act, and the examination was commenced before R. P. Morle, Esq., Special Commissioner, on or about June 5th, 1911.

XII. At a hearing before the said Special Commissioner on June 6, 1911, Mrs. Seaman was asked about the holding of the stock of the American Steel Barrel Company, and the Commissioner directed her to answer the question, which she refused to do. The matter was thereupon submitted to the Hon.
65 Thomas I. Chatfield, who sustained the objection to the inquiry, although documents were produced and submitted to the Judge over the signature of the said Elizabeth C. Seaman, which had been issued to Brown Brothers & Company as a basis for a requested extension of credits, in which statements the said Elizabeth C. Seaman had represented that the American Steel Barrel Company was an asset of the Iron Clad Manufacturing Company. There was also submitted to the said Judge a letter addressed to my firm by E. R. Gilman, General Manager of the Iron Clad Manufacturing Company and its Vice-President, under date of December 17th, 1908, said Gilman having been elected and appointed to his position solely by the said Elizabeth C.
66 Seaman, which letter contained the following statement:

> "We also own the stocks and bonds of another corporation known as the American Steel Barrel Company, valued at $100,000."

XIII. In consequence of this ruling the said Elizabeth C. Seaman refused all information about the American Steel Barrel Company, and also refused to disclose the transactions had by the said Elizabeth C. Seaman, personally, with the Iron Clad Manufacturing Company, on the ground that her

personal affairs were being inquired into, and Judge 67
Chatfield further stated to the said Elizabeth C. Seaman that she was to use her discretion in drawing the line between matters which were proper to disclose and those as to which she could refuse to answer.

XIV. In June, 1911, the petitioning creditors applied to this Court for a summary turning over to the Receiver of the Iron Clad Manufacturing Company of the capital stock of the American Steel Barrel Company, and the property and assets of the said corporation, upon the ground that the same were the property of the Iron Clad Manufac- 68
turing Company, and an asset of said corporation, delivery of which should be made to the Receiver, and said application came on to be heard by the Hon. Thomas I. Chatfield on or about June 20th, 1911. The application was made upon a record which showed conclusively that the Iron Clad Manufacturing Company and the American Steel Barrel Company were both wholly owned and operated by the said Elizabeth C. Seaman at the time all the indebtedness of the Iron Clad Manufacturing Company was incurred; that no stockholder other than Elizabeth C. Seaman had any beneficial interest whatever in the corporate assets 69
of either company; that the said Elizabeth C. Seaman had issued statements, over her signatures, to persons and corporations invited to extend credit to the Iron Clad Manufacturing Company, which represented that the American Steel Barrel Company was an asset of the Iron Clad Manufacturing Company; that representations were made by the Iron Clad Manufacturing Company to R. G. Dun & Company during the years 1906, 1907, 1908, 1909 and 1910 that the American Steel Barrel Company was a subsidiary corporation of the Iron Clad Manufacturing Company, and that the Iron Clad

70 Company owned the stock of the Barrel Company as an asset; that creditors of the Iron Clad Manufacturing Company had extended credit to the said corporation on the faith of the said statements, and that in particular the firm of Brown Brothers & Company had issued letters of credit to the Iron Clad Manufacturing Company on the faith of such statements; that Elizabeth C. Seaman had verified a return in September, 1910, to the United States Collector of Internal Revenue in the Eastern District of New York, and an amended return on November 10th, 1910, showing in a single statement the affairs of the Iron Clad Manufacturing
71 Company and the Barrel Company as being blended in one organization, with Mrs. Seaman as Treasurer and President of both corporations; that Mrs. Seaman, as President and Treasurer of both corporations had sworn to the said return and the amended return; that on September 29th, 1910, the said Elizabeth C. Seaman had addressed a letter to the Collector of Internal Revenue referring to the said return, and stating that the American Steel Barrel Company was a subsidiary company, which had never been separated from the main company; that it was simply a department; that the said presses do the work for both companies; the same
72 pay rolls are used for both companies, and that no separate books were kept, and that it was impossible to divide or separate them.

XV. The said application came on to be heard on affidavits and the documents so submitted, and the depositions of certain witnesses which had been taken in the course of the bankruptcy proceedings under Section 21ª, but no opportunity was afforded the petitioning creditors to examine witnesses in connection with the Steel Barrel application, and the Hon. Thomas I. Chatfield, after hearing argument, and within a few days thereafter, filed on

July 1st a memorandum which denied the appli- 73
cation for the present, but stated that the matter might be re-heard before Judge Veeder, if he would consent to hear the same; Judge Veeder, however, refused, on account of his other engagements, to hear a re-argument, and suggested from the bench that a reference to take proof of the facts alleged would be a more satisfactory method of procedure than to dispose of the matter upon conflicting affidavits; that thereupon the petitioning creditors proposed two forms of order to the Hon. Thomas I. Chatfield for entry, each of which provided for a reference of the issues. Judge Chatfield refused to sign either of the said orders, or to grant a refer- 74
ence, and filed a memorandum stating the grounds of such refusal on the settlement of the order, which said order was entered on July 17th, 1911.

XVI. The petitioning creditors thereupon filed a petition to revise the said order of July 17th, 1911, which came on to be heard in the Circuit Court of Appeals for the Second Circuit in November, 1911, and resulted in a reversal of the said order. The mandate of the Circuit Court of Appeals was filed in this Court on December 8th, 1911, and an order thereon was submitted to the Hon. Thomas I. Chatfield for signature, which again 75
proposed a reference of the issues. The said Thomas I. Chatfield refused peremptorily to grant an order of reference, and stated to counsel for the petitioning creditors who presented the same that no reference would be granted. On December 9th, 1911, Judge Chatfield entered a form of order on the said mandate, which recited that by the appeal to the Circuit Court of Appeals the creditors had had upheld by the Appellate Court what had already been determined in their favor, and then, instead of directing an inquiry by reference or the taking of testimony, ordered that the original mo-

76 tion to extend the receivership be placed upon the motion calendar for December 15th, 1911, to be further heard upon the record then on file in the Court, and such further affidavits or testimony as might be presented. Copies of the order as proposed by the creditors and the order as entered by the Hon. Thomas I. Chatfield are hereto annexed.

XVII. Thereafter, the petitioning creditors, by leave of the Court, filed an amended and supplemental petition on December 15th, 1911, setting out the adjudication in bankruptcy which had occurred after a trial by jury, at the November term of this
77 Court. The adjudication of bankruptcy was entered on December 2nd, 1911.

XVIII. Judge Chatfield thereupon directed that the said Elizabeth C. Seaman, the American Steel Barrel Company and one George A. Wheelock, who claimed to have purchased the stock of the Barrel Company at or shortly prior to the filing of the petition in bankruptcy of the Iron Clad Manufacturing Company, to plead to the amended and supplemental petition, and adjourned the matter until December 21st, 1911, for further consideration.

XIX. On December 21st, 1911, the petitioning
78 creditors appeared by their counsel before Judge Chatfield at the appointed time, and the request was again made in open court for an order of reference of the issues, which was refused by Judge Chatfield. The time of the respondents, Elizabeth C. Seaman and others, was further extended by Judge Chatfield, and an answer was verified and served by the said Elizabeth C. Seaman on or about January 2nd, 1912, and amended on January 9th, 1912. Judge Chatfield extended the time for the filing of further affidavits by the said Elizabeth C. Seaman and the other respondents by *ex parte* orders, until on or about February 6th, 1912.

XX. In behalf of the petitioning creditors the 79
matter was submitted to Judge Chatfield on January 26th, 1912, upon a brief which requested that an opportunity be given to take testimony either upon a reference or in open court upon the issues raised by the answer to the amended and supplemental petition. No hearing was had in such proceeding before Judge Chatfield subsequent to December 21st, 1911. On March 15th, 1912, however, Judge Chatfield filed an opinion in the said proceeding in which the statement is made that an opportunity was afforded to all parties to take testimony on December 22nd, 1911, and that no testimony, other than the affidavits and documents sub- 80
mitted, was taken by either party. The said opinion denied the application, although it stated that all the stock of the Steel Barrel Company stood in the name of the said Elizabeth C. Seaman, save the qualifying shares of the directors, at the time the petition in bankruptcy herein was filed.

XXI. The refusals of Judge Chatfield to permit an inquiry into the facts upon a reference in July, 1911, on two occasions in December, 1911, which request was repeated in the brief submitted in January, 1912, showed a bias against the petitioning creditors and in favor of the said Elizabeth
C. Seaman, and manifested a determination not to 81
allow the petitioning creditors and the Trustee to examine the books and records of the American Steel Barrel Company and to obtain the summary relief to which the petitioning creditors and their counsel believe they are entitled.

XXII. That in August, 1911, the Receiver presented to this Court a petition setting forth the removal by Mrs. Seaman of certain machines, tools, furniture, books and records of the bankrupt corporation, after the Receiver had been appointed, and

82 praying for an order directing that the property and records so removed be turned over to the Receiver, and that Mrs. Seaman be punished for contempt of Court. The application was referred to Robert F. Tilney, Esq., as Special Commissioner. The Receiver and Mrs. Seaman appeared before the Special Commissioner; witnesses were examined, and a considerable amount of evidence was submitted. Thereafter the Special Commissioner filed his report, dated October 19th, 1911, holding that Mrs. Seaman had moved the property, books and records so removed be turned over to the Court for so doing. A motion to confirm the said
83 report was argued before Judge Chatfield on October 27th, and the matter was finally submitted, so far as the Receiver was concerned, within a few days thereafter. Judge Chatfield held the matter under consideration for nearly four months, although the petitioning creditors in the interval repeatedly called the matter to his attention and requested a decision. The Special Commissioner's report was confirmed in the main by Judge Chatfield, but he refused to punish Mrs. Seaman for contempt, leaving the matter open for further consideration.

84 XXIII. Since the entry of an order on such decision on February 26th, 1912, Judge Chatfield has granted Mrs. Seaman a further hearing on an application to direct the Trustee to permit Mrs. Seaman to remain in possession of and use a portion of the machinery removed by her, although this application was opposed by the creditors and the Trustee.

XXIV. Throughout substantially all the bankruptcy proceedings, Judge Chatfield has manifested a strong bias and prejudice against the petitioning creditors, against the Receiver and against their

counsel, and has shown a strong bias toward Mrs. Elizabeth C. Seaman, who was and is the sole person interested in the subject-matter of the bankrupt corporation's property, other than the creditors. Repeated attacks were made from the Bench and in the Chambers of Judge Chatfield upon counsel for the petitioning creditors and upon the Receiver. On the other hand, extensions of time have been granted to Mrs. Seaman by *ex-parte* orders upon numerous occasions; postponements were granted of the trial of the insolvency issue at her request, and the conduct of the proceedings and the administration of the bankrupt's estate has been unreasonably delayed and the expense thereof largely increased thereby. 85 86

XXV. Unfounded charges were made by Judge Chatfield against counsel for the petitioning creditors in the matter of the certification of the record on the petition to revise the order of July 17th, 1911, the charge being that a memorandum written by Judge Chatfield at the foot of the order of July 17th, 1911, stating upon the settlement of such order, his reasons for refusing to grant a reference, was included in the record, and that thereby the counsel for the petitioning creditors misrepresented to the Circuit Court of Appeals the decision actually rendered. Whereas, in fact, the said memorandum was a part of the files of the Court, and was an official statement over the initials of Judge Chatfield of the reasons for the form of order as entered, and as explanatory of the memorandum filed by him on July 1st, 1911. 87

XXVI. Upon the filing of the mandate of the Circuit Court of Appeals and the issue of an execution against the property of Mrs. Seaman and the Steel Barrel Company, Judge Chatfield interfered with the levy on said execution by the marshal for the costs awarded by the Circuit Court of Appeals,

88 and thereby delayed for a considerable time the collection of the amount due.

XXVII. The next term of the Bankruptcy Court at which Judge Chatfield is to preside, and at which matters affecting the bankrupt corporation are to be considered and heard, will be held in April, 1912, and this affidavit is filed under Section 21 of the Federal Judicial Code and it is hereby requested that the Hon. Thomas I. Chatfield shall proceed no further in any matter affecting the Iron Clad Manufacturing Company bankruptcy, but that another judge shall be designated in the manner prescribed under Section 20 or Section 23
89 of said Federal Judicial Code, to hear and determine all such matters.

XXVIII. The reason why this affidavit was not filed ten days prior to the commencement of the said April term, is that there were and are a number of matters pending before Judge Chatfield in said bankrupt estate of great importance to the Trustee and to the creditors of said bankrupt corporation, as to which it had been hoped that action would be taken which would expedite the administration of the bankrupt's estate. The said matters are, however, by reason of the confused state
90 of the court records and the forms of order entered and proposed to be entered in relation thereto, hopelessly involved, and it is of the utmost importance to the creditors and the Trustee that the confusion in which the affairs of the bankrupt have become involved through the action or inaction of the Hon. Thomas I. Chatfield should be cleared up.

THATCHER M. BROWN.

Sworn to before me this
29th day of March, 1912.
LE GRAND VAN VALKENBURGH,
Notary Public, Kings Co.,
Certificate filed in New York Co.

Attached to Affidavit. 91

Form of Order on Mandate Proposed by Petitioning Creditors.

At a Term of the United States District Court for the Eastern District of New York, held at the Post Office Building, Borough of Brooklyn, City of New York, in said District, on the 9th day of December, 1911.

Present.—HONORABLE THOMAS I. CHATFIELD, *Judge.* 92

IN THE MATTER

OF

The Petition of ALEXANDER HARGREAVES BROWN, *et al.*, composing the firm of Brown Brothers & Co., Seaboard Coal Company and Oscar Unz, to have IRON CLAD MANUFACTURING COMPANY adjudged bankrupt. } No. 4374. 93

A petition to review an order made by the Hon. Thomas I. Chatfield, United States District Judge, in this Court on the 17th day of July, 1911, denying the motion of petitioning creditors for an order directing the American Steel Barrel Company and Elizabeth C. Seaman, individually and as President thereof, to deliver to Appleton L. Clark, as

94 Receiver of the Iron Clad Manufacturing Company, all stock certificates, books of account, records, documents and assets of every nature and description of the American Steel Barrel Company, and Elizabeth C. Seaman, as President thereof, to surrender to the said Appleton L. Clark, as Receiver of the Iron Clad Manufacturing Company, possession of all the manufacturing plant and premises, machinery, tools and appliances, and all the property and assets of the American Steel Barrel Company having been duly filed with the United States Circuit Court of Appeals for the Second Circuit, and the said petition to review having
95 come on to be heard before the United States Circuit Court of Appeals for the Second Circuit on the transcript of record certified to that Court by the Clerk of this Court, and the said Court on consideration thereof having ordered, adjudged and decreed as follows:

> "That that portion of said order appealed from which denies the motion to pass upon the question of the *bona fides* of the claim summarily, be and hereby is reversed with costs taxed at the sum of $489.15 and that the District Court be and is hereby directed to proceed in accordance with the opinion of
96 this Court."

Now, upon reading the mandate of the Circuit Court of Appeals for the Second Circuit filed herein on the 8th day of December, 1911, and on motion of Whitridge, Butler & Rice, attorneys for the petitioning creditors, it is

ORDERED that the said order, judgment and decree of the United States Circuit Court of Appeals for the Second Circuit be and the same hereby is

made the order, judgment and decree of this Court, 97
and it is further

ORDERED that Alexander Hargreaves Brown *et al.*, composing the firm of Brown Brothers & Company, Seaboard Coal Company, and Oscar Unz, the petitioning creditors herein, recover of American Steel Barrel Company the sum of $489.15 costs upon appeal as taxed, and it is further

ORDERED that this matter be referred to
, Esq., as sole Referee, to take proof of the facts and circumstances in relation to the issues raised herein by the petition of Brown 98
Brothers & Company, on June 12th, 1911, upon which an order to show cause was granted by the Hon. Thomas I. Chatfield, District Judge, on the 13th day of June, 1911, and by the affidavits upon which a second order to show cause was granted herein by Hon. Thomas I. Chatfield, District Judge, on the 16th day of June, 1911, and by the answer of the American Steel Barrel Company and Elizabeth C. Seaman, verified the 20th day of June, 1911, and report to this Court with his opinion thereon, to the end that upon the coming in of said report such further action may be taken herein as justice requires.

99

U. S. D. J.

100 **Attached to Affidavit.**

Form of Order on Mandate as Entered by Hon. T. I. Chatfield.

At a Term of the United States District Court for the Eastern District of New York, held at the Post Office Building, Borough of Brooklyn, City of New York, in said District, on the 9th day of December, 1911.

Present—HONORABLE THOMAS I. CHATFIELD, *Judge.*

101

IN THE MATTER OF The Petition of ALEXANDER HARGREAVES BROWN, *et al.*, composing the firm of Brown Brothers & Co., Seaboard Coal Company and Oscar Unz, to have IRON CLAD MANUFACTURING COMPANY adjudged bankrupt.	No. 4374.

102

A petition to review an order made by this Court on the 17th day of July, 1911, denying for the present the motion of petitioning creditors for an order directing the American Steel Barrel Company and Elizabeth C. Seaman, individually and as President thereof, to deliver to Appleton L. Clark, as Receiver of the Iron Clad Manufacturing Company, all stock certificates, books of account, records, documents and assets of every nature and description of the American Steel Barrel Company, and Elizabeth C. Seaman, as President thereof, to surrender to the said Appleton L. Clark, as Re-

ceiver of the Iron Clad Manufacturing Company, 103
possession of all the manufacturing plant, and premises, machinery, tools and appliances, and all the property and assets of the American Steel Barrel Company and giving other relief having been duly filed with the United States Circuit Court of Appeals for the Second Circuit, and the said petition to review having come on to be heard before the United States Circuit Court of Appeals for the Second Circuit on copies of certain papers certified to that court by the Clerk of this Court, and the said Court on consideration thereof having ordered, adjudged and decreed as follows:

> "That that portion of said order appealed 104
> from which denies the motion to pass upon the question of the *bona fides* of the claim summarily, be and hereby is reversed with costs taxed at the sum of $489.15 and that the District Court be and is hereby directed to proceed in accordance with the opinion of this Court."

Now, upon reading the mandate of the Circuit Court of Appeals for the Second Circuit filed herein on the 8th day of December, 1911, and on motion of Whitridge, Butler & Rice, attorneys for the petitioning creditors, it is 105

ORDERED that the said order, judgment and decree of the United States Circuit Court of Appeals for the Second Circuit be and the same hereby is made the order, judgment and decree of this Court, and it is further

ORDERED that Alexander Hargreaves Brown, *et al.*, composing the firm of Brown Brothers & Company, Seaboard Coal Company and Oscar Unz, the petitioning creditors herein recover of American Steel Barrel Company and Elizabeth C. Seaman

the sum of $489.15 costs upon appeal as taxed and there being no portion of said order of July 17th which denied "the motion to pass upon the *bona fides* of the claim summarily" but on the contrary *that* objection by the American Barrel Company having been overruled upon the first argument and an exception thereto having been taken by said Company while the plea of lack of jurisdiction to determine an apparent claim of title was taken under advisement and it was determined but "without prejudice to the making of a similar motion or any other motion at any time" that said plea was sufficient and that fraud was not sufficiently shown (in the absence of further proof to substantiate the allegations of fraud or the direct tracing of funds), and by said appeal the creditors herein having had upheld by the Appellate Court what had already been determined in their favor, it is

ORDERED that the motion to extend the receivership and to restrain the American Steel Barrel Company, said Elizabeth C. Seaman and others, be placed again upon the calendar for the 15th day of December, 1911, at 3 o'clock in the afternoon to be further heard upon the record now on file and such further affidavits or testimony as may be presented.

THOMAS I. CHATFIELD,
U. S. D. J.

Exhibit "B."

109

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

IN THE MATTER OF IRON CLAD MANUFACTURING COMPANY, Adjudged Bankrupt.	No. 4374.

110

We, CHARLES A. RIEGELMAN, EDWIN T. RICE and JOHN A. GARVER, of counsel of record for the petitioning creditors in the above proceeding, the said Edwin T. Rice being also counsel of record for Adolph Kiendl, Esq., Trustee in Bankruptcy, do hereby certify that the annexed affidavit of bias, under Section 21 of the Federal Judicial Code, as to the Hon. Thomas I. Chatfield, District Judge, and the application to have another judge designated under Section 20 of the Federal Judicial Code, or chosen under Section 23 of said Federal 111
Judicial Code, are made in good faith.

Dated New York, March 29th, 1912.

CHARLES A. RIEGELMAN,
EDWIN T. RICE,
JOHN A. GARVER.

112 **Exhibit "C."**

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

IN THE MATTER

OF

IRON CLAD MANUFACTURING COMPANY,

113 Bankrupt.

March 29, 1912.

IN THE MATTER OF A MOTION TO REOPEN THE APPLICATION TO EXTEND RECEIVERSHIP, FOR A DIRECTION THAT THE PETITIONERS BE AFFORDED AN OPPORTUNITY TO TAKE TESTIMONY, ETC., AND FOR POSTPONEMENT OF THE ENTRY OF ANY ORDER OR DECREE UPON THE APPLICATION DECIDED MARCH 15, 1912, AND FOR OTHER RELIEF.

Before VEEDER, *J.*

Appearances: Whitridge, Butler & Rice, for petitioning creditors, in support of motion, James A.
114 Allen, specially for Elizabeth C. Seaman and the American Steel Barrel Co., Emanuel Hertz, specially for George A. Wheelock, in opposition.

Motion respectfully referred to Judge Chatfield.

VAN VECHTEN VEEDER,
U. S. J.

The within application having been referred upon the return day to me by Judge Veeder, who called the motion calendar, and the motion papers having been presented by the Clerk, in the presence of

James A. Allen, appearing specially, and desiring 115
to be heard in opposition, as attorney for certain parties, Emanuel Hertz, appearing specially for George A. Wheelock, and also desiring to be heard in opposition, and Erskine B. Essig, representing certain creditors, but not taking part in said motion, and no one appearing before me on behalf of the petitioners, but a certain affidavit by Thatcher M. Brown having been brought to the attention of the Court, which affidavit was filed after the motion was referred to me by Judge Veeder and before any of the parties appeared before me, in which the said Thatcher M. Brown, as a party to the proceeding, makes an affidavit that I have a personal bias 116
either against the creditors or in favor of the opposite party to the proceeding, and asking that another judge be designated in the matter prescribed in Section 20, to hear this motion,

I DO HEREBY, in accordance with the provisions of Section 21 of the law known as the Judicial Code, and now in effect, proceed no further in this motion, and order that an authenticated copy of this statement be forthwith certified to the Hon. E. Henry Lacombe, Senior Circuit Judge now present in this Circuit, in order that proceedings may be had under Section 14 of said Act, it being apparent that this motion cannot proceed under Section 23, which is 117
prescribed as an alternative method in said Section 21 of said law.

The Court further certifies that it does not make an entry upon the records of the Court (nor does it admit) that it has any personal bias or prejudice, but on the contrary might call in question many of the statements or controvert many of the allegations contained in said papers. And this Court feels that if any disqualification exists it was also present when this Court directed a verdict of adjudication and made other decisions in favor of said creditors, and when the Judge now holding the

118 Court upheld the findings of the Special Commissioner as to charges of contempt against Mrs. Seaman.

The Court however feels that the intent of Section 21 is to cause a transfer of the case, without reference to the merits of the charge of bias, and therefore does so immediately, in order that the application of the creditors may be considered as speedily as possible by such Judge as may be designated.

THOMAS I. CHATFIELD,
U. S. D. J.

---

119 **Exhibit "D."**

UNITED STATES OF AMERICA,
Eastern District of New York, } ss.:

I, RICHARD P. MORLE, Clerk of the District Court of the United States of America for the Eastern District of New York, do hereby certify, that the papers annexed to this Certificate are true copies of the Original Record on file and remaining of record in my office.

IN TESTIMONY WHEREOF, I have caused the Seal of the said Court to be hereunto affixed at the Borough of Brooklyn, in the Eastern District of New
120 York, this 29th day of March in the year of our Lord one thousand nine hundred and twelve.

RICHARD P. MORLE,
Clerk,
By PERCY G. B. GILKES,
[SEAL.] Deputy Clerk.

UNITED STATES OF AMERICA,
Eastern District of New York, } ss.:

I, THOMAS I. CHATFIELD, Judge of the District Court of the United States of America for the Eastern District of New York, DO HEREBY CERTIFY

that I am well acquainted with the handwriting 121
of PERCY G. B. GILKES, whose name is subscribed to the annexed certificate and that the signature to the same is in his proper handwriting. AND I DO FURTHER CERTIFY that he was at the time of signing the same Deputy Clerk, and that RICHARD P. MORLE was the Clerk of the District Court of the United States of America for the Eastern District of New York, and that the attestation is in due form.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name, and affixed the seal of the said District Court, this 29th day of March in the year of our Lord one thousand nine hundred and twelve 122
and of the Independence of these United States the one hundred and thirty-sixth.

[SEAL.]

THOMAS I. CHATFIELD.

Exhibit "E."

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

123

IN THE MATTER
OF
IRON CLAD MANUFACTURING COMPANY,
Bankrupt.

Upon the affidavit of Thatcher M. Brown, the certificate of Charles A. Riegelman, Edwin T. Rice

and John M. Garver, Counsel for petitioning creditors and certificate of the Senior District Judge of this District, all filed in this Court on March 29, 1912, and which have been examined by me;

I, E. Henry Lacombe, Senior Circuit Judge of the Second Circuit, under the authority conferred by Section Twenty-one of the Judicial Code of the United States, do hereby designate and appoint the Honorable Julius M. Mayer, District Judge of the Southern District of New York, to have and exercise, in the above entitled proceeding within the Eastern District of New York, the same powers that are now vested in the District Judges of said Eastern District or either of them.

April 2, 1912.

E. Henry Lacombe,
Senior Circuit Judge,
Second Circuit.

Counsel for the respective parties may communicate with Judge Mayer, who will inform them at what time or times it may be convenient for him to hold Court in the Eastern District.

E. Henry Lacombe,
Senior Circuit Judge.

Exhibit "F."

127

At a Stated Term of the United States District Court for the Eastern District of New York, held at Post Office Building in the Borough of Brooklyn, New York, on the 22nd day of April, A. D. 1912.

Present—Hon. Julius M. Mayer, *Justice.*

In the Matter

of

Iron Clad Manufacturing Company,

Bankrupt.

128

A motion having been made upon a notice of motion bearing date the 23rd day of March, 1912, and the petition and affidavits herein to reopen the proceedings brought and the issues raised by the amended supplemental petition of Thatcher M. Brown and others, verified the 15th day of December, 1911, and the answers of the American Steel Barrel Company and Elizabeth C. Seaman, verified the 9th day of January, 1912, and joined in by George Wheelock by affidavit verified the 30th day of December, 1911, and to take evidence and proof of the issues so raised and to stay entry of an order on the opinion of Hon. Thomas I. Chatfield the 15th day of March, 1912, and said motion having come on to be heard on the 11th and 12th days of April, 1912, and after hearing Edwin T. Rice and Chas. E. Riegelman, of Counsel for the petitioners

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and Trustee in Bankruptcy, and James A. Allen, Esq., of counsel for the American Steel Barrel Company, appearing specifically for the purpose of objecting to the power and jurisdiction of the Court summarily to hear and determine the said application and to the same being re-opened and heard before the designed Judge upon the ground that the said designation was unlawful and in violation of the constitutional rights of the said American Steel Barrel Company, and of the said Elizabeth C. Seaman, and Emanuel Hertz, Esq., of counsel for George A. Wheelock, appearing herein specially for the purpose of objecting to the power and jurisdiction of the court summarily to hear and determine the said application; and it appearing that the issues herein cannot be satisfactorily determined solely in the papers, and that further inquiry is necessary or desirable in order to ascertain the facts involved in the controversy, it is

ORDERED, That the issues raised by said answer and answering affidavit to the said amended supplemental petition be and they hereby are referred to Philip J. McCook, Esq., counselor at law, as Special Master, to hear such testimony as may be offered by any of the parties hereto, with power to compel the attendance and examination of witnesses and to rule upon the competency, relevancy and materiality of such questions as may be propounded to them and to compel the production of books, of accounts, records, documents and other writings pertinent to the said issues, and it is hereby further,

ORDERED and Directed that the hearings before said Special Master proceed from day to day, at the convenience of the said Special Master, and that he report thereon with all convenient speed to this

Court, with a copy of the testimony and exhibits so 133
taken and produced before him, and it is further

ORDERED, that the parties hereto in their respective counsel appear before the said Special Master in the Library of the Federal Building in the Borough of Brooklyn, in the City of New York, at 11 o'clock in the forenoon on the 23rd day of April, 1912, for the purpose of fixing a time when the said hearings shall begin and to receive such instructions or directions from the Special Master as may be proper, and it is further

ORDERED, that until the coming in of the said report and the entry of an order therein the entry by 134
the parties of an order upon the opinion of Hon. Thomas I. Chatfield, filed the 15th day of March, 1912, be and the same hereby is stayed.

Dated Brooklyn, N. Y., April 22, 1912.

JULIUS M. MAYER,
U. S. District Judge.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

EX PARTE AMERICAN STEEL BARREL COMPANY AND ELIZABETH C. SEAMAN, PETITIONERS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS AND RULE.

Statement.

This is a petition praying that a writ of mandamus may issue out of this court, commanding Judge Thomas I. Chatfield, of the United States District Court for the Eastern District of New York, to exercise jurisdiction and proceed in the matter of the Iron Clad Manufacturing Company, bankrupt, generally and especially in the so-called extension proceedings therein, in accordance with law, and directing the vacating of the order of Judge E. Henry Lacombe, senior circuit judge of the second circuit, by which order Judge Julius M. Mayer, of the United States District Court for the Southern District of New York, was designated to take jurisdiction of the bankruptcy proceedings, and directing the setting aside of all proceedings, especially the so-called extension proceedings, had before the last-named judge.

The facts set forth in the petition upon which the relief prayed for is based are these:

On May 23, 1911, certain creditors of the Iron Clad Manufacturing Company, a corporation of the State of New York, having its principal place of business in the Eastern District of New York, began involuntary bankruptcy proceedings against that company in the District Court for the Eastern District of New York, presided over by Judge Thomas I. Chatfield. A receiver was appointed, and after a jury trial the company was adjudged bankrupt, on December 2, 1911. Previous thereto, on June 20, 1911, the petitioning creditors filed an application praying that the receivership in bankruptcy of the Iron Clad Company might be extended to include the capital stock, property, and assets of the American Steel Barrel Company, one of the present petitioners. The application was resisted on the ground that the American Steel Barrel Company was a separate corporate organization, *bona fide* owning all its corporate assets.

Judge Chatfield heard argument on the application on June 20, 1911, and on July 1, 1911, filed a memorandum denying the application for the time being. After various proceedings detailed in the petition herein and its accompanying exhibits, an amended and supplemental petition for the extension of the receivership so as to include the property and assets of the Barrel Company was filed on December 15, 1911. On March 15, 1912, Judge Chatfield filed an elaborate and exhaustive opinion (194 Fed. Rep., 906) denying the prayer for the extension of the receivership. Before an order could be entered in conformity with this opinion, one of the petitioning creditors filed an affidavit purporting to comply with section 21 of the Federal Judicial Code, charging that Judge Chatfield was personally biased and prejudiced against the affiant and in favor of Elizabeth C. Seaman, a petitioner herein, who owns a substantial part of the stock of the Iron Clad Company, bankrupt, as well as that of the Barrel Company, whose property and assets

the petitioning creditors sought to have turned over to the receiver of the bankrupt, and requesting the designation of another judge to hear and determine all matters relating to the Iron Clad Company bankruptcy. On March 29, 1912, Judge Chatfield filed a certificate declining to proceed further in the motion for the extension of the receivership, directing the certification of that fact to the senior circuit judge of the second circuit, Judge Lacombe, denying that he had any personal bias or prejudice as claimed, and at the same time averring that he "might call in question many of the statements or controvert many of the allegations contained in said papers"—*i. e.*, the papers having reference to the motion for the extension of the receivership as well as the affidavit of bias or prejudice—and that if disqualified to act as judge by reason of such bias or prejudice he was also so disqualified when he directed a verdict of bankruptcy and made other decisions in favor of the creditors and "upheld the findings of the special commissioner as to charges of contempt against Mrs. Seaman" (see 193 Fed. Rep., 781). On April 2, 1912, Judge Lacombe designated Judge Mayer to assume jurisdiction of the bankruptcy proceedings, which was accordingly done, and, on the application of the creditors, Judge Mayer referred the issues, raised by the petition for the extension of the receivership and the answers and affidavits thereto, to a special master, on April 22, 1912, and stayed the entry of an order by the parties upon the opinion of Judge Chatfield of March 15, 1912, until the report of the master and the entry of an order thereon. Since the date of the reference hearings have been conducted by the master. The petitioners herein have vigorously contested the legality of the proceedings before Judge Mayer, but without avail. It was not until January 17, 1913, that petitioners secured the services of counsel, who informed them of their right to relief by mandamus, and this fact explains the apparent tardiness in filing this petition.

ARGUMENT.

Petitioners base their right to the relief prayed for upon the following propositions of law:

I.

That the proceedings before Judge Mayer are null and void for lack of jurisdiction, and that consequently Judge Chatfield still retains jurisdiction in the matter of the bankruptcy, since—

A.

The affidavit of personal bias and prejudice does not comply with section 21 of the Federal Judicial Code.

B.

If the affidavit complies with section 21, that section has no application to this proceeding.

C.

If the affidavit complies with section 21 and that section applies to this proceeding, nevertheless that section is unconstitutional and hence compliance with it availed the petitioning creditors nothing at all.

II.

That mandamus is, under the facts presented in this petition, the proper and only remedy.

FIRST.

THE PROCEEDINGS BEFORE JUDGE MAYER ARE NULL AND VOID FOR LACK OF JURISDICTION, AND CONSEQUENTLY JUDGE CHATFIELD STILL RETAINS JURISDICTION IN THE MATTER OF THE BANKRUPTCY, SINCE—

A.

The affidavit of personal bias and prejudice does not comply with section 21 of the Federal Judicial Code.

Section 21 provides as follows:

> "Whenever a party to any action or proceeding, "civil or criminal, shall make and file an affidavit "that *the judge before whom the action or proceed-* "*ing is to be tried or heard* has a personal bias or "prejudice, either against him or in favor of any "opposite party to the suit, such judge shall proceed "no further therein, but another judge shall be des- "ignated in the manner prescribed in the section last "preceding, or chosen in the manner prescribed in "section 23, to hear such matter. *Every such* "*affidavit shall state the facts and the reasons for* "*the belief that such bias or prejudice exists and* "*shall be filed not less than ten days before the be-* "*ginning of the term of the court, or good cause* "*shall be shown for the failure to file it within such* "*time.* No party shall be entitled in any case to "file more than one such affidavit, and no such "affidavit shall be filed unless accompanied by a "certificate of counsel of record that such affidavit "and application are made in good faith. The same "proceedings shall be had when the presiding judge "shall file with the clerk of the court a certificate "that he deems himself unable for any reason to "preside with absolute impartiality in the pending "suit or action." (Italics ours.)

This section is new legislation (*Hopkins, Judicial Code*, p. 28), the reported cases involving it are few in number, only three to be precise and all of these in district courts of the United States, and consequently this case comes before the court largely as one of first impression.

It is submitted that the affidavit is insufficient in two respects: First, in coming too late in the proceedings, and, secondly, in not stating facts showing personal bias or prejudice within the meaning of section 21.

1.

The affidavit in the bankruptcy proceedings herein was not filed until after Judge Chatfield had written and filed an opinion denying the prayer for the extension of the receivership. At that time thirty-two hearings had been had before Judge Chatfield in these proceedings, including also the extension proceedings, and thirteen hearings had been had before Judge Veeder, also a judge of the United States District Court for the Eastern District of New York, all without protest as to bias or prejudice on the part of either judge. Does an affidavit filed in a case at such a juncture comply with section 21 as to time of filing? We submit not. That section provides that the judge who may be disqualified by the filing of an affidavit of personal bias or prejudice must be "the judge before whom the action or proceeding is to be tried or heard." Judge Chatfield obviously did not answer this description on March 29, 1912, when the affidavit here was filed. At that time the bankruptcy matter had been before him for nine months, and the proceedings for the extension of the receivership had also been before him for a like period of time. Consequently he could not be disqualified in the manner attempted here.

But section 21 does not leave the time within which the affidavit must be filed to mere inference. The latter part of that section specifically states that "every such affidavit * * * shall be filed not less than ten days before the beginning of

the term of the court, or good cause shall be shown for the failure to file it within such time." The reference is beyond question to "the beginning of the term of the court," at which the "action or proceeding * * * is to be tried or heard." Rev. Stat., section 572, provides:

> "The regular terms of the district courts shall be "held at the times and places following, but when "any of said dates shall fall on Sunday, the term "shall commence on the following day:
>
> * * * * * * *
>
> "In the eastern district of New York, in Brooklyn, "on the first Wednesday in every month."

The term of the district court for the eastern district of New York at which the bankruptcy of the Iron Clad Company was to be tried was the June, 1911, term, which began under the section of the Revised Statutes just cited, on the first Wednesday of that month. But the affidavit of bias and prejudice was not filed here until more than nine months thereafter, as previously stated. And, if the petition for the extension of the receivership be considered the institution of a new proceeding within the meaning of section 21, the affidavit was still too late, since that petition was filed on June 20, 1911, a hearing thereon was had in June and the petition was dismissed on the first of July following. And, going even a step farther and conceding that the amended and supplemental petition for the extension of the receivership started a new proceeding within the meaning of section 21, the petitioning creditors are no better off, because that petition was filed on December 15, 1911, the matter was heard by Judge Chatfield on December 21, 1911, the creditors submitted on their brief on January 26, 1912, and the opinion denying the prayer of the petition was filed on March 15, 1912, all before the affidavit was filed. If the proceeding with reference to which the affidavit was filed be considered to be the proceeding begun by the petition for the extension of the receivership, whether the orig-

inal or the amended and supplemental petition, the affidavit was clearly too late, since at the time of its filing that proceeding was substantially concluded with the exception only of the entry of a formal order in conformity with the opinion of the court. If on the other hand the proceeding, to which the affidavit was directed, was the general bankruptcy proceeding begun in June, 1911, the affidavit was even more clearly ineffective to oust Judge Chatfield of jurisdiction over the bankruptcy matter under section 21.

The affidavit, purporting to comply with that section, states that the next term of court "at which matters affect-" ing the bankrupt corporation are to be considered and " heard will be held in April, 1912," and the failure to file the affidavit not less than ten days before the beginning of the April term of court is sought to be excused by the averment—

> " that there were and are a number of matters pend-
> " ing before Judge Chatfield in said bankrupt estate
> " of great importance to the trustee and to the cred-
> " itors of said bankrupt corporation, as to which it
> " had been hoped that action would be taken which
> " would expedite the administration of the bank-
> " rupt's estate. The said matters are, however, by
> " reason of the confused state of the court records
> " and the forms of order entered and proposed to be
> " entered in relation thereto, hopelessly involved,
> " and it is of the utmost importance to the creditors
> " and the trustee that the confusion in which the
> " affairs of the bankrupt have become involved
> " through the action or inaction of the Hon. Thomas
> " I. Chatfield should be cleared up." (Pet., p. 30.)

Section 21 provides for the filing of the affidavit "not less " than ten days before the beginning of the term of the " court, or good cause shall be shown for the failure to file " it within such time." The affidavit filed here seems to assume that a filing ten days before the beginning of the April term of the court would have been a compliance

with section 21. It has just been pointed out that this is an erroneous view of the section, and that the affidavit should have been filed not less than ten days before the beginning of the June, 1911, term of the court, at which term the first hearings in the bankruptcy proceedings were had, and should not have been filed in any event later than ten days before the beginning of the December, 1911, term, at which the hearing on the amended and supplemental petition for the extension of the receivership was held. But conceding for purposes of argument that a filing not later than ten days before the April, 1912, term of court would have satisfied section 21, it is confidently submitted that the asserted excuse set out in the affidavit does not show "good cause," within the meaning of that section, for the tardy filing of the affidavit. Every fact subscribed to in the affidavit developed in the course of the bankruptcy proceedings and was known to all the parties concerned. The last alleged misdeed of Judge Chatfield and the real *gravamen* of the affidavit was the refusal of that judge to refer the extension proceedings to a master for a hearing on the facts. This refusal was the subject of the able and extensive opinion of Judge Chatfield filed on March 15, 1912 (194 Fed. Rep., 906). This opinion was thus known to the affiant creditor about three weeks before the beginning of the April, 1912, term of court. Inasmuch, therefore, as every fact stated in the affidavit as showing personal bias or prejudice was known to the creditors not less than three weeks before the April, 1912, term of court, the asserted excuse for failing to file the affidavit ten days before the beginning of that term is unavailing, even conceding that a filing at that time would have been in accordance with section 21. Moreover, the facts alleged as an excuse for the tardy filing of the affidavit are couched in such general and vague language that it is impossible to determine just what are the specific circumstances meant to be stated in extenuation.

Petitioners earnestly contend that to allow a disgruntled and unsuccessful litigant to wait until a cause has been tried

or heard on the merits and an opinion adverse to his interests has been handed down, and then come into court with an affidavit of personal bias and prejudice on the part of the presiding judge, and thereby secure the designation of another judge to hear the matter *de novo*, thus robbing his successful antagonist of the fruits of his victory, as was done here, presents a situation that was not and could not have been contemplated or intended by Congress in enacting section 21. It results in perverting a law intended to accomplish a beneficent purpose into an instrument of positive injustice. The practical consequence of sanctioning such a procedure would be to permit the defeated party to secure two hearings or trials on the merits as a matter of right, in addition to such a review by an appellate court as he might have under ordinary rules of procedure, a consequence which, it is submitted, conflicts with all primary conceptions of right and justice and is totally inconsistent with the ideals of Anglo-Saxon jurisprudence.

In *State ex rel. vs. Donlan*, 80 Pac., 244, 247, the Supreme Court of Montana, in interpreting a statute similar to section 21 here, said:

> "Was the affidavit filed in time to disqualify Judge
> " Donlan from hearing the motion upon settling the
> " account? It will be noticed that amended section
> " 180 contemplates that, once a judge has been found
> " to be disqualified in any action or proceeding, he
> " must not thereafter sit in it at any stage of it.
> " Such is the effect, also, of section 2530, as amended
> " by the act of 1897, with reference to probate pro-
> " ceedings. The latter section declares that the
> " judge, whenever any of the grounds of disqualifi-
> " cation are made to appear of record, shall there-
> " after call in another judge, who shall from time to
> " time preside in the place of the disqualified judge.
> " This implies that any of the disqualifications enu-
> " merated may be made to appear at any time. Sec-
> " tion 180, however, declares that the particular dis-
> " qualification of imputed bias and prejudice shall be
> " made to appear by affidavit filed at any time before

"the day fixed for the trial or hearing. A hearing "includes the trial—a hearing on a motion or in a "proceeding of any other character. The words "'action' and 'proceeding,' of course, include all "steps to be taken in an action or proceeding, for "a motion is but a step in a case or proceeding "in a case; but, whether the use of the word "'motion' broadens the application of the stat- "ute or not, the intention is clearly manifested that "the affidavit is not to be regarded as effective to in- "terrupt a hearing after the arrival of the day fixed "for that purpose, no matter whether it be a final "hearing or trial or merely a step taken in the case, "involving a decision of some controverted matter. "The disqualification of imputed bias and prejudice "provided for in subdivision 4 of the act is purely "statutory. It does not rest upon the ascertainment "of any fact, but only upon an imputation. Such "being the case, and the statute being open to so "much abuse, we are inclined to construe it strictly "according to its express terms, and not broaden it "by implication to include conditions not clearly "within them. * * * The statute does not admit "of a construction that would permit a litigant to "file an affidavit of disqualification after the day for "hearing has arrived, and thus rob the court or "judge of the power to proceed."

In *Swineford vs. Pomeroy*, 16 Wis., 553, 554-555, the the court, in construing a statute, the language of which was very similar to that of section 21, involved herein, but which did not specify the time when the affidavit was required to be filed, stated:

"This cause was tried in the county court before a "jury. The plaintiff read the notes in evidence and "rested. The other side then entered upon their de- "fense and, after considerable testimony had been "given, applied for a change of venue on account of "the prejudice of the judge. The application was "denied, and as we think, very justly. It is true, the "statute provides that whenever a party in a civil "action pending in a court of record shall apply for a

"change of the place of trial on account of the preju-
"dice of the judge, and shall verify the application
"by oath or affirmation, the court shall change the
"place of trial. Section 8, ch. 123, R. S. This
"statute must have a rational construction. It is not
"to be supposed that it was intended to grant a party
"the right to change the place of trial after a jury is
"empaneled and testimony has been given in the
"cause. Such an idea is not to be entertained, ex-
"cept upon the clearest evidence that this is the ex-
"press meaning and intention of the statute. Other-
"wise, a person whose moral sensibilities were not
"very acute and nice, might, after entering upon the
"trial of the cause, because the judge ruled contrary
"to his expectations or unfavorably to him, apply
"for a change of the place of trial and obtain it.
"This practice, of course, would frequently be at-
"tended with the greatest inconvenience and in-
"justice. But we are decidedly of the opinion that
"the statute was never intended to apply to such a
"case, or grant any such right, at that stage of the
"cause. When a party makes a seasonable and
"proper application for a change of the place of trial
"because of the prejudice of the judge before whom
"the suit is pending, he is entitled to the change.
"But this application should be made before a jury
"is called, and a trial of the cause entered upon;
"otherwise the application will be too late. This, we
"are satisfied, is the proper construction of the stat-
"ute, and that no other interpretation could be given
"it without producing much mischief."

Section 21 of the Judicial Code was considered by Judge Newman, of the United States District Court for the Northern District of Georgia in *Ex parte Glasgow*, 195 Fed. Rep., 780. The petitioner there sought a writ of *habeas corpus* directed to the warden of the United States penitentiary at Atlanta, Georgia, where he was confined under sentence of the district court for the district of Delaware upon conviction of depositing an obscene book in the United States mail. The petitioner had been indicted in the latter court on October

16, 1911, and had been tried and found guilty in December, 1911. Motions in arrest of judgment and for a new trial were made on December 21 and 23, 1911, and set for hearing on January 6, 1912. When these motions came on to be heard petitioner filed an affidavit under section 21 alleging that the judge of the district court for the district of Delaware, who had tried the case and was about to hear the motions in arrest and for a new trial, was disqualified, and the affidavit was certified by his counsel. The district judge for Delaware held that:

> "In the judgment of the court, whatever may be "the applicability of the section to other cases dif- "ferently circumstanced, it does not and was not in- "tended by Congress to apply to this case at its pres- "ent stage, and consequently there was no authority "or justification for the filing of such an affidavit as "that in question."

The motions were overruled and petitioner was sentenced to the Atlanta penitentiary. In denying the application for the writ of *habeas corpus* Judge Newman said (p. 782):

> "But the real question in this case is whether or "not, under section 21 of the new Judicial Code, an "affidavit such as is provided for therein can be filed "after a case has been tried and there is a verdict, "and where a motion in arrest and for a new trial "has been made, and the attempt by the affidavit is "to disqualify the judge from concluding the case, "ruling on these motions, and sentencing the de- "fendant if he overruled them. It will be observed, "from what has been said as to the dates applicable "to this case at its various stages, that the case had "been tried and a verdict rendered before this new "Judicial Code went into effect on January 1, 1912. "Now, can it be conceived that it was the purpose of "Congress to apply this act to such a situation? The "section itself provides that such an affidavit shall be "filed not less than 10 days before the beginning of "the term of the court or good cause should be shown "for failure to file within that time.

"The meaning of this section is that the affidavit
" should be filed certainly before the trial of the case
" commences, unless good reason to the contrary is
" shown. The act evidently contemplates that usually
" and generally such an affidavit shall be filed not less
" than ten days before the beginning of the term at
" which the trial shall take place. It would require
" some specific language in this act to satisfy me that
" Congress intended such an affidavit to be filed at
" the stage which had been reached in this case."

The situation in the bankruptcy proceedings herein with reference to the time of the filing of the affidavit is very similar to that presented in *Ex parte Glasgow, supra,* and the language just quoted has direct application to the facts disclosed by this petition.

Ex parte Glasgow came before this court in *Glasgow vs. Mayer,* 225 U. S., 420. Some of the language of Judge Newman's opinion relating to the time of the filing of the affidavit in the trial court is quoted in the opinion of this court (p. 426), but without comment. This court disposed of the case on the ground that the petitioner had mistaken his remedy.

The closest analogy to section 21 of the Judicial Code is that part of section 28 which provides for the removal of cases from the State to the Federal courts, where diversity of citizenship exists and where there is a showing that because of prejudice or local influence justice cannot be had in the State courts. The pertinent language of that section is as follows:

"And where a suit is now pending, or may here-
" after be brought, in any State court, in which there
" is a controversy between a citizen of the State in
" which the suit is brought and a citizen of another
" State, any defendant, being such citizen of another
" State, may remove such suit into the district court
" of the United States for the proper district, *at any*
" *time before the trial thereof,* when it shall be made
" to appear to said district court that from prejudice

" or local influence he will not be able to obtain jus-
" tice in such State court, or in any other State court
" to which the said defendant may, under the laws
" of the State, have the right, on account of such
" prejudice or influence, to remove said cause."

This provision, as formulated above, has been a part of the Judicial Code since the act of March 3, 1887, 24 Stat. L., 552, c. 373. The only change introduced by the new Judicial Code is the provision for a removal to the proper district instead of to the proper circuit court.

Fisk vs. Henarie, 142 U. S., 459, a case that had been pending in a State court for almost four years, where it had been tried three times, was removed to the Federal court on the ground of diverse citizenship and "prejudice or "local influence," This court held that the case was not removable at the juncture it had reached in the State court and interpreted the language of the removal provision "at " any time before the trial thereof" as requiring "the peti-" tion to be filed before or at the term at which the cause " could first be tried, and before the trial thereof" (p. 467).

It is submitted that, by analogy, section 21 of the Judicial Code does not permit the filing of an affidavit of personal bias or prejudice on the part of the judge after the trial or proceeding has reached the advanced stage that the bankruptcy proceedings herein had reached, and that *the requirement that the affidavit be filed "not later than ten " days before the beginning of the term of the court" refers to the term of the court at which the action or proceeding is first to be tried or heard and not to any subsequent term at which the trial or hearing is to be continued.*

Certainly it would require a very strong showing of bias or prejudice to warrant the disqualification of a judge after his opinion in a case had been written and filed and nothing remained to be done except the entry of an order thereon, as was the situation here. This naturally suggests a consideration of the averments of the affidavit and a determination of their sufficiency as showing personal bias or prejudice.

2.

Petitioners submit that the affidavit is insufficient because the facts stated therein do not disclose personal bias or prejudice within the meaning of section 21. That section provides not only that the affiant shall state "that the judge "* * * has a personal bias or prejudice either against "him or in favor of any opposite party to the suit," but that he shall also set out "the facts and the reasons for the "belief that such bias or prejudice exists." Now personal bias or prejudice is a mental fact like intention and malice, and is consequently incapable of proof by direct or primary evidence. Consequently Congress must have intended that the affidavit should contain secondary or indirect evidence of that fact. Three possible kinds of such evidence suggest themselves: *a*, evidence of causal facts which would be likely to produce bias or prejudice in the average mind, such as, for example, evidence of close relationship, whether blood or business relationship, of the judge to one of the litigant parties, or evidence of the political defeat of the judge as a candidate for public office in competition with one of the parties; *b*, evidence of transactions between the judge and one or more of the parties, prior to the case in which it is sought to disqualify him, in which the judge manifested bias or prejudice in favor of or against some one or more of the parties; *c*, evidence of the rulings of the judge in the trial or proceeding itself in favor of or against a party. The most satisfactory kind of evidence of such bias or prejudice is obviously evidence falling in class *a*, and the least satisfactory is that falling in class *c*. It is submitted that evidence falling in class *c* does not satisfy section 21, because, as has been shown, that section contemplates the filing of the affidavit, setting out the facts, "not less than "ten days before the beginning of the term of the court" at which "the action or proceeding is to be tried or heard." Hence it would be a physical impossibility to rely upon the

rulings of a judge in the trial or proceeding to be had as showing bias or prejudice. Moreover, the law gives a remedy for mistaken rulings of a trial judge by appeal or writ of error, and it is not to be presumed that it was the intention of Congress in enacting section 21 to give a cumulative remedy. This result is not altered by the fact that the language of that section by implication permits the filing of the affidavit later than "ten days before the beginning of the "term of the court" if "good cause shall be shown for the "failure to file it within such time." It is submitted that this exception applies only to a case where the facts showing bias or prejudice, though existing previous to the term of the court at which "the action or proceeding is to be tried or "heard," were not discovered by the party desiring to have a change of judge in time to make it possible to file the affidavit at least "ten days before the beginning of the term "of the court." The statute contemplates that in the normal case the affidavit will be filed "not later than ten days "before the beginning of the term of the court" in which "the action or proceeding is to be tried or heard," and consequently must also contemplate that "the facts and the "reasons for the belief that such bias or prejudice exists," are then in existence and capable of being known.

The affidavit involved here relies entirely on facts falling within class *c* as showing personal bias or prejudice on the part of Judge Chatfield. It is not stated that the judge knew any of the parties to the proceeding prior to the time of the litigation itself, or that he is related to Mrs. Seaman in any manner, or that he is a stockholder of the Barrel Company, or that he had shown himself to be inimical to the affiant prior to the institution of the bankruptcy proceedings. An analysis of the affidavit discloses that the affiant relies substantial'y on these alleged facts as disqualifying Judge Chatfield under section 21:

1.

The order of Judge Chatfield directing the receiver of the Iron Clad Company to continue to operate the power plant of that company for the sole benefit of the Barrel Company, whose property and plant is immediately adjacent to that of the Iron Clad Company.

2.

The ruling of Judge Chatfield sustaining the right of Mrs. Seaman to refuse to answer the questions that were asked her at the hearing on June 6, 1911, before the special commissioner, appointed under section 21*a* of the Bankruptcy Act, about the holding of the stock of the Barrel Company.

3.

The denial by Judge Chatfield of the application of the creditors in June, 1911, for the extension of the receivership, so as to embrace the Barrel Company.

4.

The denial by Judge Chatfield of the second application of the creditors on December 15, 1911, for the extension of the receivership and his refusal to refer this question to a master, as it is alleged the reversal of his first denial (set out in paragraph 3, *supra*) by the Circuit Court of Appeals (191 Fed. Rep., 831) required him to do. This second denial was the occasion of the opinion in 193 Fed. Rep., 906.

5.

The delay of Judge Chatfield for nearly four months in passing upon the report of the special commissioner appointed to investigate the charges of contempt brought against Mrs.

Seaman for removing certain machines, tools, etc., of the bankrupt corporation after a receiver had been appointed. The opinion of Judge Chatfield, confirming the findings of the special commissioner is reported in 193 Fed. Rep., 781.

6.

Miscellaneous alleged acts of misconduct, such as "repeated attacks * * * from the bench and in the chambers of Judge Chatfield upon counsel for the petitioning creditors and upon the receiver," extensions of time and postponements granted to Mrs. Seaman by *ex parte* orders, charges that counsel for the creditors misrepresented to the Circuit Court of Appeals the decision refusing the first application for the extension of the receivership and for a reference to a master, and interference with the levy of execution on the mandate of the Circuit Court of Appeals awarding costs on the petition to revise Judge Chatfield's first refusal to extend the receivership.

This analysis makes it clear that practically every fact subscribed to, if true, was the proper subject of an exception for review by a circuit court of appeals, except possibly No. 4, *supra*, which could have been remedied by a writ of mandamus from the circuit court of appeals to Judge Chatfield directing him to enter an order in conformity with the mandate of reversal. The assertion that Judge Chatfield abused counsel for the creditors as well as the receiver in bankruptcy is of no importance here, since neither was an "opposite party to the suit." It is clear, furthermore, from this analysis that every fact relied upon occurred during the course of the very proceeding in which it was sought to disqualify Judge Chatfield, and hence falls within class *c*, *supra*.

But even overlooking this fatal defect in the affidavit and conceding that the alleged facts set out therein are competent to show bias or prejudice, it is confidently submitted that the admission of their truth does not warrant the conclusion

that the fact of bias or prejudice is established thereby. In the consideration of the affidavit from this viewpoint, of course, all mere *inferences* of fact on the part of the affiant creditor must be disregarded, and only the *facts* stated must be considered in addition to such other facts as are of record—as, for example, the direction of a verdict of bankruptcy by Judge Chatfield, as well as his confirmation of the report of the special commissioner who investigated the question as to Mrs. Seaman's being in contempt of court. In *People vs. Findley,* 64 Pac., 472, 473, the Supreme Court of California. in construing a statute similar to section 21, said:

> "The affidavit or affidavits must not only state facts,
> " but the facts stated must establish to the satisfaction
> " of a reasonable mind that the judge has a bias or
> " prejudice that will, in all probability, prevent him
> " from dealing fairly with the defendant."

The affidavit in that case stated (1) that the judge sought to be disqualified advocated the candidacy of his brother-in-law for tax collector as against defendant's candidacy for the same office, and that the defendant received the appointment much to the judge's displeasure; (2) that the judge had consented to a reduction of defendant's bail from $10,000 to $6,000, and subsequently withdrew his consent without reason; (3) that at a former trial of the case a certain newspaper published an editorial criticising and deriding the defendant and the disagreeing jury, and intended to prejudice the public against defendant, and that but for the bias of the judge against defendant the editor would have been cited for contempt; (4) that after defendant's counsel had made his opening statement the judge said "in an audible voice and within hearing of the jury * * * that he never had any doubt as to the sanity of the defendant," notwithstanding that insanity was one of the defenses relied on; (5) that the judge had issued a foreign subpœna at the request of the prosecution, but refused to issue such a subpœna to bring in a material witness for defendant. These facts were held insufficient to show bias or prejudice.

In *Burke vs. Mayall*, 10 Minn., 287, the affidavit stated that there had been six different proceedings of one kind or another having relation to the foreclosure of a mortgage in which affiant was interested, and that the judge had made six erroneous decisions against affiant in reference to matters arising in these proceedings, which decisions could be accounted for only on the assumption of prejudice and ill-will on the part of the judge. The court said, however:

> "Now, while it is very possible that some of these "decisions may have been erroneous in point of law, "and while it is certain that the holders of the mort- "gage have had an unusual experience of the 'law's "'delay,' we see no evidence that the judge below was "prejudiced against the appellant, or actuated by any "other than the purest and fairest motives in making "the various decisions which the appellant claims to "have resulted in depriving him of his just and legal "rights."
>
> See also *Higgins vs. City of San Diego* (Cal.), 58 Pac., 700.

In the cases *supra* the facts stated in the affidavit, though certainly no less strong than those in the affidavit here, were held insufficient—in fact, it would be difficult to imagine any case in which the unsuccessful litigant could not compile quite as formidable a catalogue of grievances as was done here.

B.

If the affidavit complies with section 21, that section has no application to this proceeding.

Section 21 is new legislation. It did not become effective until the new Judicial Code went into effect on January 1, 1912. At that time the bankruptcy proceedings herein, including the so-called extension proceedings, had been before the court for almost six months. It is submitted that it could not have been the intention of Congress to make this section

apply to trials and proceedings which had reached such an advanced stage at the time it went into effect. It was so held in *Ex parte Glasgow, supra,* and the opinion in that case shows that this was the view taken by the District Court for the District of Delaware, in which the trial was had. The very fact that section 21 provides for the filing of the affidavit "not less than ten days before the beginning of the term of the court" at which "the action or proceeding is to be tried or heard" shows conclusively that Congress did not contemplate the application of that section to a proceeding which had reached the point that the bankruptcy proceedings herein had reached on January 1, 1912.

C.

If the affidavit complies with section 21 and that section applies to this proceeding, nevertheless that section is unconstitutional, and hence compliance with it availed the petitioning creditors nothing at all.

It is submitted that section 21 is unconstitutional because it delegates judicial authority to a party to a suit or proceeding, and because it deprives a judge of his property right in his office without due process of law.

1.

The permanent disqualification of a judge, or of any other officer of the Federal Government, for that matter, is concededly the exercise of a judicial function. Article I, section 3, clause 6, of the Constitution provides that "The Senate shall have the sole power to *try* all impeachments." This clause is frequently referred to as the one notable instance in which the Constitution has delegated judicial authority to a legislative body. That the power "to try all impeachments" is a judicial power is shown by the language of clause 6, *supra,* and the clauses immediately following:

"When sitting for that purpose they shall be on
" oath or affirmation. When tht President of the
" United States is *tried,* the Chief Justice shall pre-
" side: And no person shall be *convicted* without the
" concurrence of two-thirds of the members present.
" *Judgment* in cases of impeachment shall not ex-
" tend further than to removal from office, and dis-
" qualification to hold or enjoy any office of honor,
" trust or profit under the United States: but the
" party *convicted* shall nevertheless be liable and sub-
" ject to indictment, trial, judgment, and punish-
" ment, according to law."

If the *permanent* disqualification of a judge is the exercise of a judicial function, so also his *temporary* disqualification must likewise be the exercise of a judicial function, since the character of the judgment that may be rendered cannot determine the inherent nature of the authority to be exercised in reaching that judgment.

Section 21 provides that immediately upon filing the affidavit of bias or prejudice the "judge shall proceed no further therein" (*i. e.,* in the trial or proceedings). This provision, if taken literally, operates automatically to disqualify the judge. The section contains the further requirement that "every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists." The determination of the sufficiency of the affidavit raises a mixed question of fact and law. These two questions must always be answered: (1) What constitutes personal bias or prejudice? and (2) Do the facts subscribed to in the affidavit show such bias or prejudice? The first is a pure question of law; the second is a question of fact. Who is to answer these questions? If the statute means to disqualify the judge *ipso facto* upon the filing of the affidavit, as its language would indicate, then the dissatisfied litigant must decide what, as a matter of law, is personal bias or prejudice and whether the facts that he subscribes to show such bias or prejudice. This results obviously in the delegation of judicial powers to one of the litigant parties.

It is submitted, therefore, that section 21 by granting judicial power to parties to suits and proceedings infringes article III, section 1, of the Constitution, which provides:

> "The judicial power of the United States shall be "vested in one Supreme Court, and in such inferior "courts as Congress may from time to time ordain "and establish."

In *Ex parte N. K. Fairbank Co.*, 194 Fed. Rep., 978, Judge Jones held section 21 to be unconstitutional, in an elaborate opinion in which the whole matter is thoroughly canvassed. At pages 993-994 he said:

> "The power to designate another than the regular "judge to hold a term of court, when the regular "judge is disqualified or cannot attend, or to try par- "ticular cases on the calendar as to which the regular "judge is in law disqualified, is not necessarily judi- "cial. That is frequently done by the governor, the "head of the executive department; but such exercise "of power by a member of the executive depart- "ment presents quite a different question from "arming a governor with the power to deter- "mine that the regular judge, on the facts of a "particular case, is disqualified to try it, and there- "upon empowering him to designate another judge. "Certainly it has never been held, in the Federal "jurisprudence at least, that such a function could "lawfully be committed to a party to the suit, and "that his mere *ex parte* affidavit, regardless of its "truth, could make it the absolute duty of the regular "judge to recuse himself, and lay a preemptory com- "mand upon another judge to send some judge to "displace the regular judge in his own court, because "a litigant made an affidavit that the latter is dis- "qualified to sit under the facts of a particular case. "If the power to decide, upon the facts of a given case "pending in the court, that a judge is disqualified to "sit in it, is judicial, it is manifest that such a power "cannot be exercised except by some member of the "judicial department, and that the question cannot "be adjudicated by the command of the statute that

"an *ex parte* affidavit of a litigant shall *ipso facto*
"disqualify a judge. This results inevitably from
"the nature of the judicial power of the United
"States, and the separation of our Government into
"three great departments, none of which can exer-
"cise any power properly belonging to the other."

It should be sharply noted that under section 28, providing for removal on ground of prejudice or local influence, such removal can only be had after "the district court shall, "on application of the other party, examine into the truth "of said affidavit, and the grounds thereof, and unless it "shall appear to the satisfaction of said court that said party "will not be able to obtain justice in the State court, it shall "cause the same to be remanded thereto."

Even an act of Parliament, says Judge Holt, "cannot "make one, that lives under a government, judge and party" (12 Mod., 688).

2.

Inasmuch as section 21 provides for an unconstitutional delegation of judicial authority, it follows that the judge, who is temporarily debarred from exercising the functions of his office is *pro tanto* deprived of his property without due process of law. That the office of a judge and the right to exercise its functions is a valuable property right needs no proof. The mere fact that it is intangible does not render it the less a property right. If it be said that only the judge who has been temporarily deprived of his office can raise this question and that neither of the petitioners herein is the disqualified judge, the answer is, that while the rule may be that parties can rely upon the unconstitutionality of a statute only in so far as it affects them directly, nevertheless unless this question can be raised *inter partes* it cannot be raised at all, for there is no manner in which the judge can bring the question to the attention of the court.

SECOND.

Mandamus is, Under the Facts Presented in This Petition, the Proper and Only Remedy.

Rev. Stat., sec. 688, provides that—

> "The Supreme Court shall have power to issue
> " * * * writs of mandamus, in cases warranted by
> " the principles and usages of law, to any courts ap-
> " pointed under the authority of the United States.
> " or to persons holding office under the authority of
> " the United States, where a State, or an ambassador,
> " or other public minister, or consul or vice-consul is
> " a party."

It is well settled that, under this provision of the law, mandamus lies to compel an inferior United States court to take or resume jurisdiction.

In re Hohorst, 150 U. S., 653.
In re Atlantic City Railroad, 164 U. S., 633.
In re Grossmayer, 177 U. S., 48.
In re James Pollitz, 206 U. S., 331.
In re Metropolitan Trust Company, 218 U. S., 312.

The above cases hold further that mandamus is the proper remedy in cases like that presented in this petition. The status of the proceedings narrated in the petition herein is such that while the motion of the creditors for the extension of the receivership has been passed upon twice and denied each time, no order has been entered on the last decision, no appeal can, therefore, be taken, and petitioners in whose favor the motion was decided, are absolutely without legal remedy to benefit by the decision, unless this court comes to their assistance by issuing a writ of mandamus, directing Judge Chatfield, who passed upon the motion, to enter an order consistent with his decision, and restraining further proceedings in the matter of the bankruptcy before Judge Mayer, who was designated to take charge of the proceedings after the attempted disqualification of Judge Chatfield.

In *In re Grossmayer, supra,* a writ of mandamus was sought to compel a circuit court to take jurisdiction of a case, and although the writ was denied, because of improper service on the defendant in the court below, this court said (p. 49):

> "* * * but if the court, after sufficient service "on the defendant, erroneously declines to take "jurisdiction of the case or to enter judgment "therein, a writ of mandamus lies to compel it to "proceed to a determination of the case, except "where the authority to issue a writ of mandamus "has been taken away by statute. *Ex parte Schal-"lenberger,* 98 U. S., 369; *Pennsylvania Company, "petitioner,* 137 U. S., 451-453; *American Construc-"tion Company vs. Jacksonville, etc., Railway,* 148 "U. S., 372-379; *Hohorst, petitioner,* 150 U. S., 653-"664."

In *In re Atlantic City Railroad, supra,* application was made for leave to file a petition for a writ of mandamus. The petitioner recited in its petition "that it is ad-"vised and believes that it has no remedy by appeal." This court said (p. 635):

> "The general power of the court to issue a writ of "*mandamus* to an inferior court to take jurisdiction "of a cause when it refused to do so is settled by a "long train of decisions; but mandamus only lies, as "a general rule, *when there is no other adequate "remedy;* nor can it be availed of as a writ of error."

The embarrassed situation in which the refusal of Judge Chatfield to enter an order in conformity with his opinion of March 15, 1912, and the attempted transfer of the jurisdiction of the proceedings to Judge Mayer, have placed petitioners herein, leaves them not only without any adequate remedy other than mandamus, but deprives them of all other remedy whatsoever.

Petitioners submit that the facts disclosed by the petition herein bring this case well within the following principle of

law laid down by this court in *Ex parte Newman*, 14 Wall., 152, 165-166.

> "Applications for a mandamus to a subordinate "court are warranted by the principles and usages of "law in cases where the subordinate court, having "jurisdiction of a case, refuses to hear and decide the "controversy, or *where such court, having heard the "cause refuses to render judgment or enter a decree "in the case*, but the principles and usages of law do "not warrant the use of the writ to re-examine a "judgment or decree of a subordinate court in any "case, nor will the writ be issued to direct what judg-"ment or decree such a court shall render in any "pending case, nor will the writ be issued in any case "if the party aggrieved may have a remedy by writ "of error or appeal, as the only office of a writ when "issued to a subordinate court is to direct the per-"formance of a ministerial act or to command the "court to act in a case where the court has jurisdic-"tion and refuses to act, but the supervisory court "will never prescribe what the decision of the subor-"dinate court shall be, nor will the supervisory court "interfere in any way to control the judgment or "discretion of the subordinate court in disposing of "the controversy."

Petitioners submit, in conclusion, that the proceedings now being had before Judge Mayer are without authority of law and void for lack of proper jurisdiction; that Judge Chatfield still has jurisdiction of the bankruptcy matter, and that consequently the writ should issue directing the latter to proceed in the cause by entering an order conformably to his decision of March 15, 1912, and enjoining further proceedings before the former, as in plain violation of law.

Respectfully submitted,

ALDIS B. BROWNE,
Attorney for Petitioners.

JOHN C. SPOONER,
ALDIS B. BROWNE,
Of Counsel.

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Office Supreme Court, U. S.
FILED.
APR 4 1913
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States,

OCTOBER TERM, 1912.

No. 14, ORIGINAL.

Ex Parte, AMERICAN STEEL BARREL COMPANY
AND ELIZABETH C. SEAMAN,

Petitioners.

RETURN OF HON. E. HENRY LACOMBE, SENIOR CIRCUIT JUDGE OF THE SECOND CIRCUIT, AND RETURN OF HON. JULIUS M. MAYER, DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK,

RESPONDENTS.

THE EVENING POST JOB PRINTING OFFICE, 156 FULTON ST., N. Y.

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Supreme Court of the United States Fol. 136

OCTOBER TERM, 1912.

Ex Parte, AMERICAN STEEL BARREL COMPANY AND ELIZABETH C. SEAMAN, Petitioners. } No. 14 Original.

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The return of E. Henry Lacombe, Senior Circuit Judge of the Second Circuit, to the rule to show cause made herein on March 3rd, 1913, respectfully shows: 137

FIRST: On or about March 29th, 1912, there were filed in the United States District Court for the Eastern District of New York, in a proceeding entitled "In the Matter of the Iron Clad Manufacturing Company, Adjudged Bankrupt, No. 4374," (1) an affidavit of Thatcher M. Brown, verified March 29th, 1912; (2) a certificate dated March 29th, 1912, signed by Charles A. Riegelman, Edwin T. Rice and John A. Garver, counsel for the petitioning creditors in said proceeding; (3) a certificate of the Honorable Thomas I. Chatfield, Senior District Judge of the United States District Court for the Eastern District of New York. The copy of the said affidavit of Brown which is annexed to the petition herein is incorrect, in that at folio 82 (p. 28, lines 12 and 13), the words "so removed be turned over to 138

the Court," should be deleted, in order to conform to the original, and the words "and that she was in contempt of court for so doing" should be written over or in the place of the words so deleted. Save for this inaccuracy, your respondent believes that the copies of the said affidavit and certificates attached to the petition herein are true copies of the originals.

SECOND: On or about April 2nd, 1912, the respondent examined the affidavit of Thatcher M. Brown, the certificate of counsel and the certificate of the senior District Judge of the Eastern District of New York. After such examination, the respondent, in the exercise of his judicial discretion, and under the authority conferred by Section 21 of the Judicial Code of the United States, did make and enter an order herein bearing date April 2nd, 1912, designating and appointing the Honorable Julius M. Mayer, District Judge of the Southern District of New York, to have and exercise in the proceeding entitled "In the Matter of the Iron Clad Manufacturing Company" the same powers that were vested in the District Judges of the Eastern District, or either of them.

THIRD: Before the order of April 2nd, 1912, was made by the respondent, the Honorable Van Vechten Veeder, the junior District Judge for the Eastern District of New York, who had theretofore heard and decided several matters arising in the course of the administration of the affairs of the Iron Clad Manufacturing Company, bankrupt, had made a request to be relieved from acting further in such bankruptcy proceedings.

FOURTH: Subsequent to the making of the order of April 2nd, 1912, designating the Hon Julius M. Mayer to act in the said bankruptcy proceedings, the matters and questions arising in the course of the said administration of the bankrupt estate, were, as

appears from the records, heard and decided solely 142
by Judge Mayer. In the course of such proceedings
an order was made by Judge Mayer on May 14th,
1912, directing Elizabeth C. Seaman and the Amer-
ican Steel Barrel Company to produce before Philip J.
McCook, Esq., as Special Master, appointed by
Judge Mayer, to inquire into the relations sustained
by the American Steel Barrel Company to the bank-
rupt corporation, certain books and records of the
American Steel Barrel Company, and on the failure
of the American Steel Barrel Company and Eliza-
beth C. Seaman to produce the books and records of
the American Steel Barrel Company so ordered,
further orders were made by the Honorable Julius
M. Mayer on June 14th, 1912, and July 3rd, 1912. 143
The order of June 14th, 1912, adjudged that the
American Steel Barrel Company was in contempt of
court for failure to produce these books in accordance
with the direction of the order of May 14th, 1912,
and the order of July 3rd, 1912, adjudged Elizabeth
C. Seaman to be in contempt of court for failure to
produce the said books. Petitions to revise the or-
ders of May 14th, 1912, June 14th, 1912, and July
3rd, 1912, were filed in the United States Circuit
Court of Appeals for the Second Circuit (copies
of which are hereto annexed marked Exhibits A and
B), and came on to be heard before the said United
States Circuit Court of Appeals at a term of said court
held in November, 1912, at which the respondent was 144
the Presiding Judge, and the Honorable Henry G.
Ward and the Honorable Walter C. Noyes wree
associate Circuit Judges. Such proceedings were
thereupon had that on December 9th, 1912, a deci-
sion was filed by said court, the opinion being writ-
ten by the respondent, affirming the orders of May
14th and June 14th, 1912, and reversing the order
of July 3rd, 1912. The opinion is reported in 201
Federal Reporter, 66, Advance Sheets, February
20th, 1913.

145 FIFTH: No petition or application was filed in the United States Circuit Court of Appeals to revise the order of April 2nd, 1912, by either the American Steel Barrel Company or Elizabeth C. Seaman, the petitioners herein, and the said order has been in effect and has been acted upon in the United States District Court for the Eastern District of New York continuously since April 2nd, 1912.

All of which is respectfully submitted.

April 1st 1913

E. HENRY LACOMBE
Senior U. S. Circuit Judge
Second Circuit

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Exhibit A.

148

UNITED STATES CIRCUIT COURT OF APPEALS

SECOND CIRCUIT.

IN THE MATTER
OF
IRON CLAD MANUFACTURING COMPANY,
Bankrupt.

149

TO THE HONORABLE CIRCUIT COURT OF APPEALS OF THE UNITED STATES FOR THE SECOND CIRCUIT.

The petition of the American Steel Barrel Company respectfully represents:

FIRST: That it is a corporation duly organized under the laws of the State of New York and is a legal entity, separate and distinct from the Iron Clad Manufacturing Company, the bankrupt corporation above named.

150

SECOND: That on the 14th day of June, 1912, an order was made and entered by the Hon. Julius M. Mayer, District Judge, sitting in and for the Eastern District of New York, in which your petitioner was adjudged in contempt of court, and as a punishment was fined Twenty-five hundred dollars ($2500); Two thousand dollars ($2000) of which was to be paid for the account of the Iron Clad Manufacturing Company and Five hundred dollars ($500) for the account of the United States, and that unless said fine is paid within ten days after the

151 services of said order upon your petitioner's attorneys, an execution be issued against the property of your petitioner.

THIRD: Upon information and belief, a copy of said order was served on your petitioner's attorneys on the 14th day of June 1912.

FOURTH: Your petitioner has not complied with said order and your petitioner feels aggrieved thereat and files this petition to review said order upon the ground that said order was erroneously made and that your petitioner was adjudged in contempt of court for refusing to obey an order made
152 by said court on May 14th, 1912, in which order the said Hon. Julius M. Mayer, District Judge, directed your petitioner to deliver certain of its books, documents and records to Philip J. McCook, Esq., as Special Master, when in truth and in fact said court erroneously made said order of May 14th 1912 (for which a petition for review is now pending in this court) upon the ground that your petitioner was and is unable to comply with said order and that it did not have said books, papers and records in its possession or under its control and was and is powerless to comply with said order.

Your petitioner therefore prays that said ruling and said order be reviewed and reversed, and that
153 such other and further relief as to the court may seem just and proper will be decreed to your petitioner.

ELIZABETH C. SEAMAN.

STATE OF NEW YORK, }
County of New York, } ss.:

ELIZABETH C. SEAMAN, being duly sworn, deposes and says: that she is the acting President of the American Steel Barrel Company, the petitioner above named; that she has read the foregoing peti-

tion and knows the contents thereof and that the same is true of her own knowledge. 154

That the reason this verification is made by deponent and not by petitioner is that the American Steel Barrel Company is a corporation of which deponent is an officer, to wit, its acting President.

ELIZABETH C. SEAMAN.

Sworn to before me this 24th day of June 1912.

MAURICE L. BRUBELIN,
Com. of Deeds, N. Y. City.

Exhibit B. 155

UNITED STATES CIRCUIT COURT OF APPEALS

SECOND CIRCUIT.

IN THE MATTER
OF
IRON CLAD MANUFACTURING COMPANY,
Bankrupt. 156

TO THE HONORABLE CIRCUIT COURT OF APPEALS OF THE UNITED STATES, FOR THE SECOND CIRCUIT.

The petition of Elizabeth C. Seaman respectfully represents:

FIRST: That she is one of the respondents in the matter above named.

SECOND: That on the 3rd day of July 1912, an order was made and entered by Honorable Julius M.

157 Mayer, District Judge, sitting in and for the Eastern District of New York, in which your petitioner was adjudged in contempt of court, and, as a punishment, your petitioner was ordered committed to the custody of the United States Marshal, for the Eastern District of New York, to remain in his custody for a period of twenty days, and in addition to such commitment was fined Three thousand dollars ($3000.), Two thousand five hundred dollars ($2,500.) of which was ordered to be paid for the account of the Iron Clad Manufacturing Company and Five hundred dollars ($500) for the account of the United States of America, and that unless said fine is paid within five days after the service of said order upon
158 your petitioner's attorneys, your petitioner was ordered committed to the custody of the United States Marshal for the Eastern District of New York, for a period of three months which shall be in addition to the period of twenty days above mentioned.

THIRD: Upon information and belief that a copy of said order was served on your petitioner's attorneys on the 3rd day of July, 1912.

FOURTH: Your petitioner has not complied with the said order, and your petitioner feels aggrieved thereat, and files this petition to review said order upon the ground that said order was erroneously
159 made, and that your petitioner was adjudged in contempt of court for refusing to obey an order made by said Court on May 14th, 1912, in which order the said Honorable Julius M. Mayer, District Judge, directed your petitioner to deliver certain books, documents, and records of the American Steel Barrel Company, of which Company your petitioner is acting President, to Philip J. McCook, Esq., as Special Master, when in truth and in fact said court erroneously made said order of May 14th, 1912 (for which a petition to review is now pending in this

Court), and upon the ground that your petitioner was unable to comply with said order, and that she did not have said books, papers and records in her possession or under her control, and was powerless to comply with said order. 160

Your petitioner therefore prays that said ruling and said order be reviewed and reversed, and that such other and further relief as to the Court may seem just and proper will be decreed to your petitioner.

ELIZABETH C. SEAMAN,
Petitioner.

STATE OF NEW YORK, }
County of New York, } ss.

ELIZABETH C. SEAMAN, being duly sworn, deposes and says: That she is the petitioner herein; that she has read and knows the contents of the foregoing petition, and that the same is true to her own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters she believes it to be true. 161

ELIZABETH C. SEAMAN.

Sworn to before me this 12th }
day of July, 1912. }

ROSE C. KEEGAN,
Notary Public,
N Y C No. 17.

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163 SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1912.

Ex-Parte, AMERICAN STEEL BARREL COMPANY and ELIZABETH C. SEAMAN, Petitioners.	No. 14 Original

TO THE HONORABLE JUSTICES OF THE SUPREME COURT
164 OF THE UNITED STATES:

The return of Julius M. Mayer, Judge of the United States District Court for the Southern District of New York, to the rule to show cause made herein on March 3rd, 1913, respectfully shows:

FIRST: On April 2nd, 1912, an order was made and entered by the Honorable E. Henry Lacombe, Senior Circuit Judge of the Second Circuit, designating and appointing the respondent to have and exercise in the proceeding entitled "In the Matter of the Iron Clad Manufacturing Company, bankrupt," the same powers that were vested in the District Judges of the Eastern District, or either of them.

165 SECOND: In pursuance of the said order, the respondent attended in the District Court of the United States for the Eastern District of New York in April, 1912 and heard argument upon a motion which had been noticed for March 29th, 1912, in behalf of Adolph Kiendl, Esq., Trustee in Bankruptcy of the Iron Clad Manufacturing Company, for an order reopening an application presented to the said District Court by an amended and supplemental petition filed December 15th, 1911, and an answer thereto filed January 2nd, 1912, directing that a rea-

sonable and fair opportunity be afforded to the 166
trustee to take testimony, examine books and records, and submit other evidence upon the issues, and postponing the entry of any order until after such testimony and evidence should be taken. Upon the argument, the American Steel Barrel Company and Elizabeth C. Seaman, and one George A. Wheelock, appeared by their counsel and opposed the motion. The respondent, on April 12th, 1912, announced his opinion at the conclusion of argument; a copy of said opinion is hereto annexed, marked "Exhibit A." On or about April 22nd, 1912, in pursuance of the decision rendered by the respondent, an order was made and entered, referring the issues to Philip J. McCook, Esq., an at- 167
torney and counsellor-at-law, as Special Master, to hear such testimony as might be offered by the parties to such proceeding. A copy of the order as entered, save for certain verbal inaccuracies, is annexed to the petition herein as "Exhibit F."

THIRD: The said Special Master has proceeded with the hearings under the said order, as the respondent is informed, and the Trustee in Bankruptcy, the American Steel Barrel Company and Elizabeth C. Seaman have all appeared before the Special Master; have examined and cross-examined witnesses; have produced voluminous documentary evidence, and, as the respondent is informed, up- 168
wards of 2072 pages of testimony have been taker in the course of the hearings before the Special Master. As the respondent is advised, such hearings were had on at least fifty days before the Special Master, commencing on April 29th, 1912, the last session being on March 7th, 1913, and the hearings are not yet concluded.

FOURTH: The hearings before the Special Master were delayed in May, 1912, because of the failure of

169 the American Steel Barrel Company and Elizabeth C. Seaman to produce before the Special Master certain books of account and records of the American Steel Barrel Company, covering the period from February, 1905, the date of the organization of the said company, to September, 1910. The Special Master directed the production of the said books, and upon the failure of the Barrel Company and Elizabeth C. Seaman to comply with the said direction, an order was made by the respondent on May 14th, 1912, directing the production of the said books and records before the Special Master. Before the said order was made, Elizabeth C. Seaman was examined before the Special Master, and also
170 before the respondent, and the said Barrel Company and Elizabeth C. Seaman appeared at said hearings by James A. Allen, Esq., the attorney referred to in the petition herein, and also by Irving L. Ernst, Esq., an attorney at law.

FIFTH: Thereafter, the books not having been produced in accordance with the order of May 14th, 1912, an order to show cause was granted by the respondent directed to the Barrel Company and Elizabeth C. Seaman, upon an application made by the Trustee in Bankruptcy to punish the Barrel Company and Elizabeth C. Seaman for contempt of court. Upon the argument of the said motion, the
171 Barrel Company and Elizabeth C. Seaman appeared by Irving L. Ernst, Esq., and Mirabeau L. Towns, Esq., and such proceedings were had that on June 14th, 1912, an order was made by the respondent adjudging the Barrel Company to be in contempt of Court, and imposing a fine of $2,500 upon said company as a punishment for such contempt. Upon July 3rd, 1912, after further hearings, an order was made adjudging Elizabeth C. Seaman to be in contempt of court, and imposing a fine of $3,000 and sentencing the said Elizabeth C. Seaman to jail for a period of twenty days. A stay was granted by the respond-

ent in order to enable the orders to be reviewed by 172
the Circuit Court of Appeals. A copy of the memorandum filed by the respondent in deciding said motion, is hereto annexed, marked "Exhibit B."

SIXTH: Since April 2nd, 1912, all matters arising in the course of the administration of the estate of the Iron Clad Manufacturing Company, bankrupt, have been heard by the respondent, and the attorneys for the Trustee of the Iron Clad Manufacturing Company, bankrupt, for Elizabeth C. Seaman, and for theAmerican Steel Barrel Company, have appeared before the respondent on the argument of motions, and various other interlocutory proceedings. Numerous orders to show cause have been 173
granted by the respondent upon the application of the trustee as well as upon the application of Elizabeth C. Seaman and the American Steel Barrel Company, and the respondent has exerciced in the course of the said proceedings, the same powers which were vested in the District Judges of the Eastern District, or either of them. The respondent has conferred from time to time with the said Philip J. McCook, Esq., as Special Master, and has been familiar with the progress of the proceedings before the Special Master, and with the progress of the general administration of the bankrupt estate. The claims against the bankrupt, as respondent is informed, amount to upwards of $600,000, and the 174
assets which the trustee now has, after paying certain expenses of administration, amount, as respondent is informed, to about $10,000. The stock of the bankrupt corporation, as appears from the record, was all owned by Elizabeth C. Seaman, who had been the president and treasurer of said corporation for a number of years prior to the filing of the petition in bankruptcy. Said Elizabeth C. Seaman, as respondent is informed, had also been the president and treasurer of the American Steel Barrel Company for a number of years prior to the institution of the

175 bankruptcy proceedings against the Iron Clad Manufacturing Company, and claimed to be the owner of all the stock of the Barrel Company until shortly before the institution of such bankruptcy proceedings.

SEVENTH: The orders made by the respondent prior to January 29, 1913, in the course of said bankruptcy proceedings, have been acquiesced in by the American Steel Barrel Company and Elizabeth C. Seaman, except in the case of the orders appealed from or sought to be reviewed in the Circuit Court of Appeals. No objection was made to the conduct of the bankruptcy proceedings before the respond-
176 ent from the date of the first hearing before the respondent in April, 1912, to January 29th, 1913, at which time a motion was argued before the respondent to compel the substitution of Louis O. Van Doren, Esq., attorney and counsellor-at-law, as attorney of record for Elizabeth C. Seaman and the Barrel Company in place of James A. Allen, Esq., who had been the attorney of record for said parties from the time of the filing of the petition in bankruptcy on May 23rd, 1911. In the course of such argument it was then for the first time stated to be the purpose of the attorney sought to be substituted, to raise the question as to jurisdiction arising out of the designation of the respondent by the Senior Cir-
177 cuit Judge, in accordance with the order of April 2nd, 1912 (Exhibit E attached to the petition herein).

EIGHTH: At the time of the issue of the rule herein, there were pending and undecided before the respondent, a number of motions and applications affecting the administration of the bankrupt estate. Among these pending proceedings were:

1. An application by the attorneys for the petitioning creditors for an allowance for services rendered in such bankruptcy proceedings;

2. An application by counsel for the receiver for an allowance for services rendered in such bankruptcy proceedings; 178

3. An application to punish Elizabeth C. Seaman and the Barrel Company for contempt of court;

4. An application by the trustee to compel the American Steel Barrel Company to pay the fine of $2,500 imposed by the order of June 14th, 1912, which order was affirmed by the Circuit Court of Appeals;

5. A proceeding to determine the value of the services rendered by James A. Allen as attorney for Elizabeth C. Seaman and American Steel Barrel Company. 179

Final disposition of these matters and of all matters affecting the administration of the bankrupt estate has been held in abeyance by respondent since the issue of the rule herein.

NINTH: During the entire period in which the proceedings in bankruptcy affecting the Iron Clad Manufacturing Company have been pending before the respondent, no one, other than Elizabeth C. Seaman, has appeared claiming any interest in the subject-matter of the Iron Clad Manufacturing Company as against its creditors, or in the subject-matter of the American Steel Barrel Company. 180 Prior to the designation of the respondent, as appears from the records, one George A. Wheelock filed an affidavit, verified December 30th, 1911, in which a claim to the capital stock of the American Steel Barrel Company was asserted, and this claim is referred to by respondent in the memorandum hereto annexed, marked "Exhibit A." At no time, however, has the said George A. Wheelock appeared in person before the respondent, and on the hearing of the

181 motion to reopen the American Steel Barrel Company proceeding, on or about April 11th, 1912, Emanuel Hertz, Esq., an attorney who had theretofore entered an appearance for the said Wheelock, requested the respondent's permission to withdraw such appearance, stating that such request proceeded from the said Elizabeth C. Seaman, which request was refused by the respondent. So far as the litigation has been conducted before the respondent, it has been a controversy between the Trustee in Bankruptcy of the Iron Clad Manufacturing Company, on the one hand, representing creditors whose claims it is stated aggregate upwards of $600,000, and Elizabeth C. Seaman, on the other hand, as the
182 former president and treasurer of the Iron Clad Manufacturing Company, and sole owner of its capital stock, and as president and treasurer of the American Steel Barrel Company, and former holder of all of its capital stock.

All of which is respectfully submitted.

JULIUS M. MAYER
Judge of the United States District Court for the Southern District of New York

183

Exhibit A. 184

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK.

IN THE MATTER
OF THE
IRON CLAD MANUFACTURING COMPANY,
Bankrupt.

185

Opinion of MAYER, *J.*

In what I may have to say I am not to be understood in the remotest way as passing upon what Judge Chatfield did. I take the proceedings precisely as they were before him and I take the statements made by the Judge absolutely as made by him. I have been designated to hear this matter and I approach it from an entirely fresh point of view, exercising my own opinion and my own judgment.

A reading of the opinion of the Circuit Court of Appeals shows that the Court in a sentence has stated the law, I refer to the part of the opinion in 186
which it is said: "We think the petitioners were entitled to have the Bankruptcy Court make a preliminary investigation summarily to determine whether or not the claim of adverse ownership is merely colorable." Following that the Circuit Court of Appeals has stated under the authorities "*Bona fides* claim of ownership by a third party raises a question which can be disposed of only by plenary suit, but the mere assertion of ownership which is or not wholly unfounded cannot preclude the Court of the disposition of the claim."

187 The doctrine of this Circuit Court is perfectly understood from the Muncie case and the law is well stated in the Holbrook Shoe & Leather Company case in 165 Fed., beginning at page 973. There, among other things, as briefly put in the headnote, it is held where on a claim of a bankrupt's trustee to the possession of property in the possession of another the referee finds that the latter's claim is in good faith and probably real but of doubtful validity or of questionable faith, it should then be determined by a plenary suit, but if he finds that the claim is without any actual merit or legal foundation he should regard the property as subject to the Bankruptcy Court's jurisdiction as property of the bank-
188 rupt and require its surrender to the trustee.

Now it seems to me that the law is well settled. The Bankruptcy Court lays its hands upon any property of the bankrupt that it can find. If when the appropriate officer, be he receiver or trustee, attempts to take the property that belongs to somebody else and a question then arises, then the inquiry is how it can be dealt with. Now if the claim is a claim in good faith, if the Court is satisfied that there is a genuine claim, then the subject matter is one for plenary suit. If the Court should not be satisfied that the claim is in good faith, if the Court should believe upon appropriate inquiry that the property in point of fact belonged to the bank-
189 rupt estate and that the claim was a mere assertion surrounded by schemes or devices to give to that assertion some substantial basis where it really has none, why then the Court says I will dispose of this here and now.

Now it seems to me in this case, as I said informally yesterday, the situation is comparatively simple. The arguments which have been, to my mind, full and capable on both sides, indicate to me that so far as I am concerned, at least, it would be a matter of difficulty and I should not be satisfied to determine upon affidavits whether this claim as to the American Steel Barrel Company is made in good

faith or not. The statements referred to in the so- 190
called printed record on their face indicate a treatment by the practical owner of both of these corporations in such manner as would indicate that she regarded the American Steel Barrel Company as the property of this bankrupt. Now it may be that she was entirely mistaken in that point of view and that she may have been misled by improper advice or faithless employees or through some other reason, but on the face of the situation there is at least a strong suggestion of ownership by the bankrupt of this other company. The transaction whereby Mr. Wheelock became the owner or his claim to be the owner of this company by owning the stock comes so closely upon the bankruptcy that that suggests 191
inquiry to the Court. The fact that books which were perfectly easy to produce at any time and in respect to the contents of which an affidavit is made, have never been produced except as stated for the inspection of the Court, never been formally produced, is something that suggests inquiry to the Court. The fact that the purchaser Wheelock has failed to definitely or with any degree of certainty state in his affidavit or in any other way to the Court the time when he got this stock, the precise amount paid for it and the circumstances under which he came to buy it, all these things suggest inquiry to the Court. Now I entertain the point of view that it is never difficult for an owner of property to show that he owns property, and what I 192
refer to here of course is on the petition where a suggested case is made out, one that on an address to the conscience of the Court sets the Court thinking. Then it seems to me that it is a very easy thing for the owner of property to show that he owns the property, and it is so easy that I think the barriers of technicality should be broken down as fully and as speedily as possible. There is a good deal of complaint about the delays in the law and contributions in that direction are made by the judges and by the lawyers. And I think it is the

193 duty of a court to go direct to the subject matter when it can.

Now that is very briefly stating my general point of view on this situation. I think that I would like to know all the facts. I would like to have them developed by the examination of books, so far as appropriate, relevant and material; and examination of persons, so far as their testimony may be relevant and material, and I personally am not at all satisfied to decide this question on affidavits. Now my duty is to ascertain within the limits of this opinion of the Court of Appeals whether or not the claim of adverse ownership is colorable or is a genuine claim. If I had time in connection with
194 my other duties I should be very glad to hear this case myself and be done with it. I could not, my other duties do not permit, and toward the latter part of the argument I have been thinking over what practical disposition I should make, and I have decided what to do and I shall refer this case to Philip J. McCook. I shall require an order that Mr. McCook shall proceed from day to day as far as may be reasonably convenient to counsel and to himself, and I shall insist that Mr. McCook shall conduct this proceeding with all convenient speed and for the purpose of informing and advising the Court as to whether the claim is a fairly contestable one and in good faith, or whether it is a colorable
195 claim.

Now it has been suggested in the course of the argument that if I should decide to refer that I should grant a stay. I think I would be unduly prolonging this litigation if I did grant a stay, and I shall decline to grant a stay.

Exhibit B.

196

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

IN THE MATTER OF IRON CLAD MANUFACTURING COMPANY, Bankrupt.	Memorandum of Judge MAYER, filed June 25th, 1912.

197

MEMORANDUM.

On May 14th, 1912, an order was made directing the American Steel Barrel Co. and Elizabeth C. Seaman and John M. Dierkes, to produce before the Special Master, all the books of account and records of the American Steel Barrel Company, from the time of its incorporation in February 1905, to September, 1910. Upon failure to comply with this order, the trustee obtained an order to show cause directed to the Barrel Company and Mrs. Seaman individually and as an officer thereof, on an application to punish the corporation and Mrs. Seaman for contempt of court in failing to obey the order of May 14, 1912.

198

It is unnecessary to recite in detail the proceedings since then, for they must be fresh in the memory of all concerned in this litigation.

I have disposed of the motion as to John M. Dierkes and as to the American Steel Barrel Company.

I have extended the time of Mrs. Seaman in the hope that she would produce, or cause to be produced, the missing books, or, failing so to do, that

199 she would make some explanation which would satisfactorily account for her failure to comply with the order of the Court.

To set forth in detail the history germane to this proceeding would unnecessarily add to the already voluminous record. That history is familiar to the parties and attorneys who have appeared before me, and need not be again related.

The record shows a persistent course of contumacious conduct and a painful disregard for the administration of justice.

The affidavits of Mrs. Seaman, verified June 17, 1912, not only fail to explain satisfactorily the disobedience of the court's order, but present, in some
200 respects, new explanations which are almost fanciful. Out of the maze of contradiction and evasion there stand two statements made by Mrs. Seaman which, in themselves, carry the conviction that she has deliberately disobeyed the order of the court. One of these is the answer to the petition in bankruptcy which said answer was signed "American Steel Barrel Company by Elizabeth Cochrane Seaman, president" and also by Elizabeth Cochrane Seaman individually, and verified by her individually and in her representative capacity as president of American Steel Barrel Company.

This answer was verified on the 20th day of June, 1911, when the events were fresh in her mind and
201 when, among other things, she was resisting the efforts of the creditors which related to American Steel Barrel Company.

In paragraph 14 of that answer it is alleged, among other things, that:

> "At the time of the filing of the said petition praying that the Iron Clad Company be adjudicated a bankrupt, the Barrel Company was in lawful, uninterrupted and undisputed possession, enjoyment and control of the said parcel of land, of the said buildings thereon erected, of its said machinery, tools, and other appliances therein contained, and of all its books of account, records, documents and assets of every nature and description;

and it has been continuously since then, and now is, in full possession, enjoyment and control of all thereof, and no part of the same or of any thereof have been or are in the possession of the Iron Clad Company or of any agent or bailee of the Iron Clad Company, or of the said receiver or of any other person on its behalf; and at the time of the filing of the said petition praying that the Iron Clad Company be adjudicated a bankrupt, the Barrel Company held and claimed, by virtue of its sole and exclusive ownership thereof, the said land or said buildings, and the said machinery, tools, appliances, and the said books of account, records, documents and assets of every nature and description and all thereof, adversely to the said Iron Clad Company and adversely to all the world; and it now so holds and claims the same adversely to the Iron Clad Company and to the said receiver and to all the world. None of the said stock certificates, books of account, records, documents, manufacturing plants, machinery, tools, appliances, property or assets of the Barrel Company specified in the said orders directing it and the said Elizabeth C. Seaman to show cause, as hereinbefore stated, was in the possession of the Iron Clad Company or of any agent or bailee of the Iron Clad Company, or of any other person or corporation on its behalf at the time of the filing of the petition; and all of the same were at the time of the filing of the said petition in bankruptcy in the actual, uninterrupted and undisputed possession, custody and control of the Barrel Company, and were then held and claimed by it adversely to the Iron Clad Company and to all the world; and it now holds the same, excepting the certificates of its capital stock, none of which have ever been owned by or in the possession of the Iron Clad Company, or of any agent or bailee of the Iron Clad Company, or of the said receiver, adversely to the Iron Clad Company and to the said receiver and to all the world; and all of the said certificates of its capital stock are lawfully held, owned and claimed by its stockholders adversely to the Iron Clad Company, to the said receiver and to all the world."

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205 This paragraph, and, indeed, the whole answer indicate careful and deliberate preparation and accord in perfect harmony with the probabilites of the case.

Mrs. Seaman was resisting any attempt on the part of the creditors to have the American Steel Barrel Co. declared the property or part of the estate of the Iron Clad Manufacturing Co., and she was giving what presumably she believed to be good reasons for the position she was taking.

It sometimes occurs that inadvertent errors are made in the papers or pleadings in a proceeding and that attorneys at times employ words of technical meaning which clients do not understand, but such
206 cannot be construed to be the case in this answer, and especially in paragraph 14 thereof. There the pleader is alleging facts and facts of a simple character and readily understood by a person of the intelligence of this respondent.

An answer which raises the issues in a litigation is a solemn and formal document not lightly to be cast aside nor disregarded, and this answer was so accepted, for this contested case went to trial and to an adjudication.

The respondent now seeks to avoid the effect of that answer.

The second statement above referred to is that made before Hon. Thomas I. Chatfield, when the
207 defendant said "Judge, if you will prevent these people from getting these books until after the trial, you can have the books."

This remark is one upon which much reliance may be placed because it was so essentially human. It was that kind of an impulsive remark which so often discloses the truth where a skillful cross-examination might fail.

I refer to these two statements as in themselves convincing, but they in turn might be eliminated from the record and the record would, nonetheless, show in cumulative detail in the way of testimony and conduct, a deliberate intention not to deliver these books.

The administration of this estate has been seri- 208
ously obstructed and the estate itself has been burdened with expense because of this delay and of the efforts to defeat the object sought by the trustee and the creditors, namely, that the books should be subjected to the scrutiny of the court and its duly appointed officers.

The record leaves no escape from the conclusion that the defendant is guilty of contempt of court.

An order may be presented on notice providing for a fine of $3000. and commitment for twenty (20) days. On failure to pay the fine the commitment will be for an additional three months.

If the order were executed forthwith the result would be a denial to the respondent of the right of 209
appeal in view of the fact that the Circuit Court of Appeals has adjourned for the vacation.

I have declined to grant a stay in the case of American Steel Barrel Co. because if my order should not be sustained restoration may be had and no injury done.

Here dealing with an individual the situation is different, and she is entitled to a review of the action of the court of first instance. I will, therefore, grant a stay conditioned upon her bringing up a review of my order at the earliest date and also conditioned upon her filing an undertaking in a moderate amount, to indemnify the trustee against disbursements and costs of appeal.

210

The order will be settled on notice returnable before me at the Court House in Eastern District, on July 1, 1912, at 11 A. M.

It may be possible (although I think the hope is vain), that the respondent may conclude to obey the court's orders. If that or any other event occurs which, in the opinion of counsel for either side, requires my action, a motion to modify the order may be made after September 15, 1912, on five days' notice.

June 25th, 1912.

[7110L]

24

No. 14 Orig

Office Supreme Court, U. S.
FILED.
APR 1 1913
JAMES H. McKENNEY
CLERK

UNITED STATES SUPREME COURT

Ex Parte, AMERICAN STEEL BARREL COMPANY AND ELIZABETH C. SEAMAN,

Petitioners.

RETURN OF THOMAS I. CHATFIELD, UNITED STATES DISTRICT JUDGE, EASTERN DISTRICT OF NEW YORK.

In the Supreme Court 1

OF THE UNITED STATES.

OCTOBER TERM 1912.

Ex Parte, AMERICAN STEEL BARREL COMPANY and ELIZABETH C. SEAMAN,
Petitioners.

TO THE HONORABLE THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES: 2

For a return to the rule to show cause, granted herein upon the 3rd day of March, 1913, directed to Thomas I. Chatfield, District Judge of the United States for the Eastern District of New York, and others, the said Thomas I. Chatfield, as District Judge aforesaid, respectfully shows and states to the Court:

FIRST: That he acted as one of the District Judges of this District in certain portions of the bankruptcy proceedings against the Iron Clad Manufacturing Company, referred to in the petition verified February 22, 1913, upon which the aforesaid rule was granted. 3

SECOND: That in such proceeding, upon a motion to extend the receivership, or (as finally submitted after adjudication) to turn over to the possession of the trustee the property and assets of the American Steel Barrel Company, an opinion was filed by your respondent, upon the 15th day of March,

1912 (194 Fed. 906) denying the application upon the record before the Court.

That an order denying this motion was presented to your respondent for signature, but was not signed, upon request of the attorneys for the creditors, who stated that they desired to make a new application for the same relief and to offer testimony in support of the same.

That said new application was made at a regular motion calendar called by the Honorable Van Vechten Veeder, District Judge, upon the 29th day of March, 1912, was referred by him to your respondent, and proceedings were then immediately had in open court as set forth in the court records, (a copy of which is printed as Exhibit C, on pages 38, 39, 40 and 41 of the petition for the rule herein).

Your respondent, still deeming it wise to do nothing which might interfere with any directions of the Senior Circuit Judge of the Circuit, further withheld signature of the order denying the previous motion, and later learned the contents of the order of the said Senior Circuit Judge, the Honorable E. Henry Lacombe (a copy of which order is printed as Exhibit E, on pages 41 and 42 of said petition).

Your respondent also then had in mind the order dated April 22, 1912, made by the Honorable Julius M. Mayer, District Judge (a copy of which is printed as Exhibit F, on pages 43, 44 and 45 of said petition) by which order the Honorable Julius M. Mayer, (after consideration of the question with your respondent), restrained "*the parties*" to the bankruptcy proceeding from entering an order upon the motion already decided by your respondent.

In view of the statements of Judge Mayer in his opinion filed April 15, 1912, viz., "In what I may have to say I am not to be understood in the re-

motest way as passing upon what Judge Chat- 7
field did. I take the proceedings precisely as they were before him and I take the statements made by the Judge absolutely as made by him." * *
"I should not be satisfied to determine upon affidavits whether this claim as to the American Steel Barrel Company is made in good faith or not," your respondent has endeavored to avoid complicating the proceedings before Judge Mayer and has respected the apparent intent of the order of the Senior Circuit Judge, under date of April 2, 1912, in that, he has not yet entered any order upon the motion decided by your respondent in the opinion filed upon the 8
15th of March, 1912, but has since the said 29th of March, 1912, treated all matters in connection with the Iron Clad Manufacturing Company proceeding generally, as well as the third proceeding to turn over the property of the American Steel Barrel Company (as to which the affidavit under Section 21 of the Judicial Code was filed) as before the Honorable Julius M. Mayer, District Judge for the Southern District of New York, holding court in the Eastern District of New York under the designation of the said Senior Circuit Judge, or under the provisions of an order entered in this court on the 22nd day of 9
May, 1912, under Section 97 of the Judicial Code.

THIRD: That the foregoing, together with the statements in the certificate of your respondent (as printed in Exhibit C annexed to the petition herein) sets forth the circumstances governing your respondent's action, and is his answer to the direction to show cause why he should not resume jurisdiction and proceed in the Iron Clad Manufacturing Company proceeding generally, and especially in the extension proceedings therein, wherein your respondent's opinion was filed

10 March 15, 1912, to the extent of entering an order on that decision and proceeding to final determination therein.

FOURTH: That the foregoing circumstances set forth the only matters which your respondent can present as to the further prayer that the order of the Honorable E. Henry Lacombe, under date of April 2, 1912, be set aside, that the proceedings thereunder be quashed, and that your respondent be directed to again exercise jurisdiction over said bankruptcy proceedings.

FIFTH: As stated in the certificate of March
11 29, 1912, your respondent has avoided controverting the statements contained in the affidavit of Thatcher M. Brown, verified March 29, 1912 (printed in the petitioner's record as Exhibit A, on pages 17 to 30), and does not now understand that the merits of the matter have any place in the consideration of the present application; nor did your respondent care to question the right of the creditors to apply the statute on this motion, as was done in the case of Henry vs. Speer, 201 Fed. 869. But your respondent repeats the statement in his certificate to the Senior Circuit Judge, to the effect that, if the facts of the said matter
12 should at any time be called in question, and if his conduct in this proceeding could come under discussion, that he could and would controvert and deny the various matters therein charged.

SIXTH: As to all the matters concerned herein your respondent has stated the facts as they are known to him and further sayeth not.

All of which is respectfully submitted.

THOMAS I. CHATFIELD,
U. S. District Judge,
Eastern District of New York.

March 29th, 1913.

25

No. 14 Original.

UNITED STATES SUPREME COURT.

Supreme Court, U. S.
FILED.
APR 19 1913
JAMES H. McKENNE
CLERK

Ex Parte AMERICAN STEEL BARREL COMPANY AND ELIZABETH C. SEAMAN,

Petitioners.

TRAVERSE OF AMERICAN STEEL BARREL COMPANY AND ELIZABETH C. SEAMAN, PETITIONERS, TO THE RETURN OF HON. THOMAS I. CHATFIELD, OF HON. E. HENRY LACOMBE AND OF HON. JULIUS M. MAYER, TO THE RULE TO SHOW CAUSE, DATED MARCH 3RD, 1913.

A. B. BROWNE,
Attorney for Petitioners.

JOHN C. SPOONER,
A. B. BROWNE,
Of Counsel.

THE EVENING POST JOB PRINTING OFFICE, 156 FULTON ST., N. Y.

In the United States Supreme Court, 1

OCTOBER TERM, 1912.

No 14 ORIGINAL.

Ex parte, AMERICAN STEEL BARREL COMPANY and ELIZABETH C. SEAMAN,
Petitioners.

TRAVERSE OF THE AMERICAN STEEL BARREL COMPANY AND ELIZABETH C. SEAMAN TO THE RETURN OF HON. THOMAS I. CHATFIELD; TO THE RETURN OF HON. E. HENRY LACOMBE; AND TO THE RETURN OF HON. JULIUS M. MAYER; TO THE RULE TO SHOW CAUSE ISSUED HEREIN MARCH 3RD, 1912. 2

TO THE HONORABLE THE JUDGES OF THE SUPREME COURT OF THE UNITED STATES:

Now come the AMERICAN STEEL BARREL COMPANY and ELIZABETH C. SEAMAN, petitioners herein, and as and for their traverse to the Return of Hon. Thomas I. Chatfield; to the Return of Hon. E. Henry Lacombe; and to the Return of Hon. Julius M. Mayer, to the rule to show cause issued herein 3
March 3rd, 1913, by this Honorable Court to the said Judges, respectfully show and allege as follows:

I.

AS TO THE RETURN OF HON. THOMAS I. CHATFIELD.

FIRST: Your petitioners allege and show that it was solely because of the presentation and filing of

the affidavit of bias (Exhibit A, attached to your petitioners' petition herein) and the certificate of counsel (Exhibit B, likewise attached) that said District Judge Chatfield declined to proceed further in the matter or proceeding which on the 29th day of March, 1912, was pending before him herein; as appears by the certificate or statement of said District Judge Chatfield, dated March 29th, 1912 (Exhibit C, attached to the petition herein).

SECOND: Your petitioners aver that nothing appears of record in the said United States District Court for the Eastern District of New York showing what consideration of the question was had between District Judge Mayer and District Judge Chatfield, referred to in folio 6 of Judge Chatfield's return herein, but your petitioners allege that the said order made by District Judge Mayer, dated April 22nd, 1912 (Exhibit F, attached to the petition herein), staying "the entry by the parties of an order upon the opinion of said Judge Chatfield, filed the 15th day of March, 1912," was equivalent to preventing the signature of such order, and did so prevent it, and has ever since prevented it, and that said District Judge Chatfield has not signed such order, and that your petitioners have been deprived thereby of the benefit of his decision in their favor.

THIRD: Your petitioners allege and show that the refusal of District Judge Chatfield further to proceed in the matter of the Iron Clad Manufacturing Company, extension proceedings therein, and in all other proceedings therein, upon and after the 29th day of March, 1912 was based solely upon the said affidavit of bias and certificate of counsel hereinbefore referred to; and that the order of Hon. E. Henry Lacombe, dated April 2nd, 1912 (Exhibit E, attached to the petition herein) was likewise based upon the said affidavit of bias and the said certificate of counsel and the said statement or certificate of District Judge Chatfield (said Exhibits A,

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B and C, attached to the petition herein), and upon and pursuant to the alleged authority conferred by 7
Section 21 of the Judicial Code and upon no other papers, proceedings or authority, as appears by the said order of said Hon. E. Henry Lacombe, dated April 2nd, 1912 (Exhibit E, attached to the petition herein); and, that in respect to the order which in the Return of Judge Chatfield at folio 9 is said to have been entered in the District Court of the United States, for the Eastern District of New York, on the 22nd day of May, 1912, by District Judge Veeder and himself, said order could have had no relation to the proceedings in the Iron Clad Manufacturing Company, bankrupt, extension proceedings, or other 8
proceedings therein, for that said proceedings had been theretofore attempted to be so transferred, under Section 21 of the Judicial Code, by the designation of District Judge Mayer, by the order of said Hon. E. Henry Lacombe, dated April 2nd, 1912, one month and twenty days before the date, *i. e.*, May 22nd, 1912, of said order; nor is said order of May 22nd, 1912, made part of any Return herein or annexed thereto; and in respect of said order last named your petitioners aver that it is void for want of definiteness, and as a general abdication by the Judges who signed it of their judicial functions, and not within the true intent and meaning of said Section 97 of said Judicial Code; and that if as to 9
this your petitioners are in error, that then that there was no request by said Judges Chatfield and Veeder, or either of them, requesting said Judge Mayer to perform any duties of said Judges of the Eastern District of New York in respect of said Iron Clad Manufacturing Company Bankruptcy proceedings.

For the information of this Honorable Court, the petitioners append hereto, as Exhibit G, a copy of said order of May 22nd, 1912, referred to by date only in the Return of said Judge Chatfield, but of which the nature and purposes are not disclosed.

10 II.

AS TO THE RETURN OF HON. E. HENRY LACOMBE.

FIRST: Your petitioners allege, and show, that the proceedings pending before said District Judge Chatfield on March 29th, 1912, and which by said order of Circuit Judge Lacombe, dated April 2nd, 1912, were transferred to said District Judge Mayer by alleged authority of Section 21 of the Judicial Code, were proceedings to reopen a matter twice previously heard and determined by Judge Chatfield in favor of your petitioners, and that said proceedings were not by action or plenary suit, brought and by due process of law, maintained and prosecuted, by the
11 trustee of the alleged bankrupt to recover property, but were the renewal of two previous motions or summary proceedings to compel a summary turning over to the trustee in bankruptcy, all of the capital stock, property and assets of your petitioner, the American Steel Barrel Company, a lawfully organized corporation of the State of New York, organized in February, 1905, more than six years prior to the filing of the petition in bankruptcy against the Iron Clad Manufacturing Company, and which American Steel Barrel Company had conducted for many years prior thereto, a very large business; and that following the order of April 2nd, 1912, designating him, the said Hon. Julius M. Mayer, made
12 the order of April 22, 1912, reopening said summary proceeding and referring it to said Philip J. McCook as Special Master, and directing that the hearings before said Special Master proceed from day to day; and that your petitioners duly objected to the jurisdiction of District Judge Mayer to make said order of April 22nd, 1912, and to the legality of the designation of April 2nd, 1912, of said District Judge Mayer, when said proceeding to reopen first came before District Judge Mayer, as appears by said objections, recited in said order of Judge Mayer, of April 22nd, 1912 (see Exhibit F, said order of April 22nd, 1912, attached to the

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petition herein; fols. 130 and 131); and that on the 13
28th day of May, 1912, your petitioners American Steel Barrel Company and Elizabeth Cochrane Seaman, did appear before said District Judge Mayer upon said alleged contempt relating to certain old or former books of the American Steel Barrel Company, and that on said occasion your petitioners were represented by James A. Allen, Esq., at that time their general attorney, and by Irving L. Ernst, Esq., and Mirabeau L. Townes, Esq., and that your petitioners there duly reserved and saved their objection to the jurisdiction of the said Judge and that it was thereupon stated by said District Judge and counsel, among other things, as follows, speaking of the contempt proceedings pending before him: 14

> "Mr. Ernst: I believe the stipulation refers to proceedings for punishment of contempt, you Honor.
>
> The Court: It refers to this particular proceeding that is before us now.
>
> Mr. Ernst: And not to the question of the extension of the receivership?
>
> The Court: Not at all." (Fol. 494, petition to revise order of June 14th, 1912, and order of July 3rd, 1912, U. S. Circuit Court of Appeals, 2nd Circuit, in the matter of Iron Clad Manufacturing Company and American Steel Barrel Company and Elizabeth C. Seaman).

SECOND: Your petitioners allege and show, in regard to the fifth paragraph of the return of said 15
the Hon. E. Henry Lacombe, that there never was any appeal taken from the decision of said Judge Chatfield, filed March 15th, 1912; that the said decision was in favor of your petitioners; that the entry of an order thereon was stayed by said District Judge Mayer, and said order has never been entered, nor have your petitioners ever been enabled to enter it or cause it to be signed; nor did the trustee in bankruptcy or the creditors, who were defeated before said District Judge Chatfield in said matter for the second time, by his said decision of March 15th, 1912, take any steps to review said deci-

16 sion by appeal therefrom, or otherwise, nor has the same ever been reviewed by said Court. And that your petitioners are informed and verily believe that no appeal would lie or could be maintained from the order of Hon. E. Henry Lacombe, of April 2nd, 1912, made pursuant to Section 21 of the Federal Judicial Code, as therein stated, for that the said order was *ex parte* but on the contrary, your petitioners again refer this Honorable Court to the statements contained in the fifteenth paragraph of their petition, namely, that their former attorney applied to said Hon. E. Henry Lacombe for an order to show cause why the said affidavit and certificate of designation of the
17 Hon. Julius M. Mayer should not be vacated and set aside, but that said Hon. E. Henry Lacombe declined to grant such an order, and that the said James A. Allen, Esq., thereupon requested the said Hon. E. Henry Lacombe to designate a day upon which a motion might be made to vacate and set aside said order and certificate of designation, but that the said Hon. E. Henry Lacombé declined to designate such a day, and that in his return herein the said Hon. E. Henry Lacombe does not question your petitioners' said allegations. And that your petitioners have protested against the said order of April 2nd, 1912, and have continuously urged, protested and caused to be noted, their objections to
18 the legality of said order and to the jurisdiction of said District Judge Mayer thereunder, and to the validity of said order of April 2d, 1912, and to the sufficiency and form of the affidavit of bias upon which said order was based, and at each and every stage of said proceedings before said District Judge Mayer down to the time of the issuance of the Rule by this Honorable Court; as is hereinafter, in reference to the Return of District Judge Mayer, more particularly shown and set forth.

THIRD: And your petitioners allege and show in regard to the allegations in paragraph fourth of the

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Return of Hon. E. Henry Lacombe, that at the 19
time of the making of the order by Hon. Julius M. Mayer on May 14th, 1912, the former books of your petitioner, American Steel Barrel Company, directed thereby to be produced before Philip J. McCook, Esq., as Special Master, were not in the possession, custody or control of your petitioners, and your petitioners did not know of their whereabouts, so it was impossible for your petitioners to produce them; and that although said District Judge Mayer fined your petitioner Elizabeth C. Seaman for contempt of court for not producing said books, his said order in that respect was reversed on appeal by the United States Circuit Court of Appeals, (201 Fed. R., 66), and although said District 20
Judge Mayer fined your petitioner, the American Steel Barrel Company, likewise for contempt of court in not producing said books, and said order adjudging your petitioner in contempt was affirmed by the United States Circuit Court of Appeals, your petitioner has not yet paid said fine but had intended to petition for a remission of said fine; for that on the night of January 1st, 1913, the said books were, by parties unknown to your petitioners, placed in the vestibule of the residence of your petitioner Elizabeth Cochrane Seaman, at No. 15 West Thirty-seventh Street, Borough of Manhattan, City of New York, and that thereupon your petitioners immediately delivered 21
the said books into the custody of the District Court of the United States, where they have since remained, and that your petitioners have had said books examined by Macpherson, Weiss & Company, Certified Public Accountants, at a great expense and the said books are necessary and material on behalf of your petitioners upon the trial of any issue as to the ownership by the American Steel Barrel Company of its capital stock, property and assets, and upon the fact that the American Steel Barrel Company was a creditor in the approximate amount of $400,000, of the Iron Clad Manufacturing

22 Company on the 23rd of May, 1911, when the petition in bankruptcy was filed against the Iron Clad Manufacturing Company, as to which said indebtedness the said books are proof, and that herewith is presented and made a part of this traverse an affidavit of William F. Weiss, of said firm of accountants, supporting this allegation, and marked Exhibit I.

III.

AS TO THE RETURN OF HON. JULIUS M. MAYER.

FIRST: Your petitioners allege and show that they have not at any time acquiesced in the designation
23 of District Judge Mayer under the order of Hon. E. Henry Lacombe of April 2nd, 1912, or in the proceedings had before him or by his direction, pursuant to said designation; but, on the contrary, your petitioners have regularly and consistently stated, urged and noted their objections to his jurisdiction and to the legality of his said designation, and especially as follows, namely:

1. In the order of April 22, 1912, being Exhibit F attached to your petitioners' petition, where, at folio 130, it is recited among the recitals in said order:

> "And James A. Allen, Esq., of counsel for the American Steel Barrel Company, appearing specifically for the purpose of objecting to
24 the power and jurisdiction of the Court summarily to hear and determine said application, and to the same being reopened and heard before the designated Judge upon the ground that the said designation was unlawful and in violation of the constitutional rights of the said American Steel Barrel Company and of the said Elizabeth C. Seaman."

2. At the opening of the proceedings before said Philip J. McCook, Esq., where it was noted by Mr. Allen:

> "I desire to make and do make the same objections to the hearing taking place before

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the Special Master upon the same grounds 25
which were urged in opposition to the motion heard before Judge Mayer for the reopening and rehearing of the proceeding" (referring to the aforesaid objection noted in said order).

3. Upon the proceedings to substitute an attorney in the place of Mr. Allen, which began by affidavit and order to show cause, dated January 27, 1913, your petitioners stated in an affidavit of Elizabeth C. Seaman, verified January 17, 1913, upon which the order to show cause was applied, for the following reservation of objection:

"That in making this application for an 26
order to show cause and for a substitution of attorneys American Steel Barrel Company and Elizabeth C. Seaman do hereby reserve their right at all times to challenge the constitutionality of Section 21 of the Federal Judicial Code and the regularity, legality and sufficiency of the papers called affidavit and certificate of bias heretofore filed against the continuation of the jurisdiction in this case of Hon. Thomas I. Chatfield, United States District Judge for the Eastern District of New York, and the legality of the order of removal and designation of another Judge, and the legality and jurisdiction of the order appointing Philip J. McCook, Esq., Special Master herein, and all other proceedings had under said order, and each of them, and do 27
not waive the same."

4. In the order finally entered on said application dated February 15, 1913, your petitioners again had their objection to the jurisdiction of District Judge Mayer and to the legality and regularity of his designation reserved and noted in the following language, namely:

"ORDERED, that the taking of this proceeding and the making of this order shall not in any manner likewise be deemed any waiver

28 by American Steel Barrel Company or Elizabeth C. Seaman of their objection to the jurisdiction of this Court noted in the affidavits upon which the order to show cause herein was granted."

5. In appearing in opposition to a motion brought on by the Trustee in Bankruptcy against your petitioners by order to show cause, dated the 23rd day of January, 1913, your petitioners filed affidavit of Louis O. Van Doren, verified January 27, 1913, in which your petitioners again objected to the jurisdiction of District Judge Mayer and to the legality of his designation, in the following language:

29 "Deponent further says that he respectfully raises the objection that the proceeding before Special Master McCook and the order appointing him Special Master therein, as well as the order transferring the matter of the Iron Clad Manufacturing Company from the jurisdiction of Honorable Thomas I. Chatfield, are all without jurisdiction, and that Section 21 of the Federal Judicial Code is unconstitutional and void."

6. That upon said application last mentioned said District Judge Mayer made an order over the objection of the American Steel Barrel Company and Elizabeth Cochrane Seaman, its president, of which annexed hereto is a true copy marked Exhibit H.

30

7. In applying to District Judge Mayer for an order to show cause, dated the 13th day of March, 1913, why all proceedings before Special Master Philip J. McCook should not be adjourned until the decision of the United States Supreme Court upon the return of the Rule herein, dated March 3rd, 1913, your petitioners again reserved in the affidavit of Louis O. Van Doren, verified March 13, 1913, upon which the said order to show cause was applied for, their objection to the jurisdiction of the

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Court and to the designation of Judge Mayer, in the following language: 31

> "That the said application for said order to show cause and the motion brought on thereby are made without prejudice to the objection heretofore made by the said American Steel Barrel Company and Elizabeth Cochrane Seaman to the jurisdiction of the said Hon. Julius M. Mayer herein and without waiving or intending to waive the said objection in any manner."

8. In applying to Hon. Julius M. Mayer for an order to show cause, dated March 13, 1913, why certain time of your petitioners to complete a certain record on appeal from the order above mentioned, 32 dated February 5, 1913, and marked Exhibit H, hereunto annexed, until after the hearing and the determination by the Supreme Court of the United States of its said Rule herein, your petitioners again reserved their objection to the jurisdiction of said Court and to the legality of the designation of Judge Mayer in the affidavit of Louis O. Van Doren, verified March 13, 1913, in the following language:

> "That the said application for said order to show cause and the motion brought on thereby are made without prejudice to the objection heretofore made by the said American Steel Barrel Company and Elizabeth Cochrane Seaman to the jurisdiction of the said Hon. Julius M. Mayer herein and without waiving 33 or intending to waive the said objection in any manner."

9. And in all appearances in Court in all proceedings taken by your petitioners, or in which your petitioners have been parties in the matter of the Iron Clad Manufacturing Company, Bankrupt, since the making of the order by Circuit Judge Lacombe, dated April 2, 1912, designating said District Judge Mayer, your petitioners have without exception stated, urged, and caused to be noted their objections

to the jurisdiction of the Court under said designation of April 2, 1912, and to the legality of such designation.

SECOND: Your petitioners allege and show that it is true, as stated in paragraph 3 of the Return of said Judge Meyer herein, that there has been a lengthy proceeding before Special Master McCook (namely, thirty-seven sessions at which testimony was taken), but your petitioners aver that such proceedings have been conducted with such assiduity and unusual rapidity as seriously to interfere with their rights, and by such a number of counsel and under restraining orders, such as the order hereto annexed, marked Exhibit H, as have prevented your petitioners from sooner being informed of their rights and remedies in this behalf and exercising the same to petition this Honorable Court for the rule issued herein on March 3, 1913, since said J. A. Allen unsuccessfully endeavored to secure an order to show cause from Judge Lacombe or a date upon which a motion could be made by your petitioners to vacate said order of April 2, 1912.

That your petitioner, American Steel Barrel Company, was organized more than six years before the bankruptcy of Iron Clad Manufacturing Company and has done a very large business in the making and selling of steel barrels and drums in its own name, and that while its business transactions with Iron Clad Manufacturing Company were numerous, your petitioner is and was an entirely distinct and separate corporation, and that annexed hereto and marked Exhibit I is the affidavit of William F. Weiss, showing that the relation between the Iron Clad Manufacturing Company and your petitioner American Steel Barrel Company was that of debtor and creditor, the result of which, was that at the time of the filing of the petition in bankruptcy against Iron Clad Manufacturing Company,

that corporation was indebted to your petitioner, 37
American Steel Barrel Company, in the approximate sum of $400,000.

That owing to the multiplicity of proceedings pending against your petitioners in regard to the bankruptcy of the Iron Clad Manufacturing Company, and the continuous and rapid prosecution of the same as aforesaid, and in which your petitioners are necessary and largely interested parties, such proceedings have compelled your petitioners to employ a large number of counsel and assistants, clerks and employees, and your petitioners' power and ability properly to defend themselves and to assert their rights in said proceedings, have been greatly hampered by the restraining order hereto 38
annexed, marked "Exhibit H," the allowances mentioned in which having been exhausted and used up within a few weeks after the signing of said restraining order, so that your petitioners are now unable to make any further payments to attorneys and counsel, or to pay necessary assistants, clerks and employees in the defense of your petitioners' rights.

THIRD: Your petitioners further allege, in respect of those parts of the Return of District Judge Mayer relating to the proceedings wherein your petitioners were adjudged in contempt by said Judge, that the remark of your petitioner Elizabeth Cochrane Sea- 39
man, quoted at folio 207 of said Return, was not made concerning the books afterwards surreptitiously returned in the night of January 1, 1913, but concerning certain other books which were almost immediately after said remark brought into court before Hon. Thomas I. Chatfield, who thereupon stated:

> "The Court: Upon the production of these books, which are the books of the Barrel Company, and these checks and stubs, I will excuse you from further attendance under that order, until I take up the question further of this minute book." The Court then

made some directions as to the use which the books could be put and adjourned to November 1st, 1911.

"XII. At the adjourned date the minute book was produced and the court ruled that the motion had been disposed of by the production of the book" (pp. 224–232, Petition to Revise order of June 14, 1912, and order of July 3, 1912; U. S. Circuit Court of Appeals, Second Circuit. In the Matter of Iron Clad Manufacturing Company, Bankrupt; American Steel Barrel Company, Elizabeth C. Seaman, Petitioners).

And your petitioners further allege that the books of the American Steel Barrel Company for the non-production of which your petitioners were declared in contempt by said Hon. Julius M. Mayer, by his said orders of June 14, 1912, and July 3, 1912, were taken away from your petitioners at the time of the bankruptcy proceeding against the Iron Clad Manufacturing Company and detained and secreted and removed by persons unknown to your petitioners, and without their connivance or knowledge, and that said books were on the night of the 1st day of January, 1913, placed by persons unknown to your petitioners in the vestibule of the residence of your petitioner, Elizabeth Cochrane Seaman, and that your petitioners thereupon immediately caused said books to be delivered into the custody of the United States District Court held by said District Judge Mayer, where they were opened, examined and listed.

That subsequently, at an expense of approximately $6,000.00, your petitioners caused the firm of Macpherson, Weiss & Co. to examine the books of the Iron Clad Manufacturing Company and the said books of the American Steel Barrel Company, for the purpose of testifying before Special Master McCook, and showing the course of business between said respective corporations, as indicated by the said books and systems of accounts kept by the respective

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corporations, part of which said expense your petitioners have not yet paid and are unable to pay because of said order, Exhibit H, for the reasons above stated. 43

FOURTH: That among the creditors of the Iron Clad Manufacturing Company, your petitioner American Steel Barrel Company is a claimant for the sum of $445,811.89; your petitioner Elizabeth Cochrane Seaman is a claimant for $213,486.35; and Mrs. Mary J. Cochrane, the mother of your petitioner, is a claimant for $12,553.21; and that the first two claims above mentioned have been disputed, but that the claim of Mary J. Cochrane has not been disputed and is an allowed claim. 44

FIFTH: That your petitioners are informed and verily believe that the Receiver and Trustee in Bankruptcy of the Iron Clad Manufacturing Company have received assets and realized thereon the total sum of $41,892.15, and that the sources of your petitioners' knowledge and information are Reports of Special Commissioner Tilney on the Receiver's accounts, filed June 14, 1912, and the orders confirming Trustee's Sales, filed April 30, 1912, and October 28, 1912, November 11th and 21st, 1912, and your petitioners further allege that there are still in the possession of the Trustee machinery appraised at $63,473.66, and real estate of great value. 45

SIXTH: Your petitioners respectfully traverse as inaccurate, that they have at any time acquiesced in the jurisdiction of the Hon. Julius M. Mayer, or in the legality of the order designating him, made by Circuit Judge Lacombe, and dated April 2, 1912, but on the contrary, your petitioners refer again to their statement, notation and reservation of their objections to the proceedings taken under said order from the outset, hereinbefore in paragraph First of this traverse set forth.

46 SEVENTH: Your petitioners respectfully traverse as inaccurate, that no objection was made to the conduct of the bankruptcy proceedings before District Judge Mayer from April, 1912, to January 29, 1913, but, on the contrary, respectfully refer to the objections to his jurisdiction beginning with the objection noted in his order of April 22, 1912, heretofore in paragraph First of this traverse set forth.

EIGHTH: Your petitioners respectfully traverse as inaccurate, that it was stated for the first time in the argument on the motion for a substitution of Louis O. Van Doren in the place and stead of James A. Allen, Esq., that your petitioners intended to
47 raise the question of the jurisdiction of District Judge Mayer, arising out of the designation aforesaid of April 2, 1912, by Senior Circuit Judge Lacombe, as stated in paragraph seventh of the Return of District Judge Julius M. Mayer, and your petitioners respectfully refer to the statement made in the affidavits upon which the order to show cause for said substitution was granted, heretofore in paragraph First of this traverse set forth.

NINTH: And your petitioners respectfully aver that paragraph Eighth of the said return of said Hon. Julius M. Mayer does not accurately set forth the proceedings pending before him in the matter of the
48 Iron Clad Manufacturing Company, Bankrupt, at the time of the issuance of the rule of this Honorable Court, in that there is no application to punish your petitioners Elizabeth C. Seaman or the American Steel Barrel Company for contempt of Court now pending, unless the return of same was intended to refer to what is known as the "Four Barrel Case," in which the Special Master has filed his decision, absolving your petitioners from any contempt, which report has not yet been moved for confirmation. That your petitioners have no knowledge of the proceedings marked one and two, in paragraph Eighth of the Return of said Hon. Julius M. Mayer.

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TENTH: And your petitioners respectfully traverse 49
the allegation in paragraph Ninth of the said Return of said District Judge Mayer, namely, that this litigation is a controversy between the Trustee in Bankruptcy of the Iron Clad Manufacturing Company on the one hand, representing creditors whose claims it is stated aggregate upwards of $600,000, and Elizabeth C. Seaman, on the other hand, as the former President and Treasurer of the Iron Clad Manufacturing Company and sole owner of its capital stock, and as President and Treasurer of the American Steel Barrel Company, and as former holder of all of its capital stock, and your petitioners allege that for the past two years your petitioner, Elizabeth C. Seaman, has not been the owner of any 50
the capital stock, except one share, of the American Steel Barrel Company, and has not had such capital stock in her possession, but that the owner of record and in fact of said capital stock, except one share, is and has been since April 11, 1911, one George A. Wheelock, now sojourning in France. That said George A. Wheelock has appeared in person and been examined in the course of the bankruptcy proceeding against the Iron Clad Manufacturing Company, and that the reason he has not appeared before District Judge Mayer is that since the designation of said District Judge Mayer, said Wheelock has been sojourning in France.

51
ELEVENTH: And your petitioners further allege and show that since March 29th, 1912, the date of the presentation and filing of the affidavit of alleged bias and certificate of counsel (Exhibits A and B, attached to your petitioners' petition herein) your petitioners have been engaged daily and on many nights, holidays and Sundays in defending the American Steel Barrel Company from seizure by the Trustee in Bankruptcy of Iron Clad Manufacturing Company, and that your petitioners have been compelled to give practically their entire time

52 to motions before District Judge Mayer; to defending the proceeding referred by said District Judge to Philip J. McCook, Esq.; to defending your petitioners from charges of contempt; to opposing motions to limit and restrain the corporate rights and powers of your petitioners The American Steel Barrel Company; to endeavoring to appeal to the Circuit Court of Appeals from the order of February 5th, 1913, hereto annexed, marked Exhibit H; to instituting and carrying on elaborate proceedings necessary to procure the substitution of a new attorney in the place and stead of James A. Allen, Esq., and to obtaining copies of exhibits introduced before said Philip J. McCook, Esq., and
53 in procuring the examination by expert accountants of a great number of books and records of Iron Clad Manufacturing Company and American Steel Barrel Company and taking statements amounting to several hundred pages from said accountants preliminary to framing the questions to be put to said accountants in direct—all of which had to be done under great pressure, as the Special Master was insisting upon almost continuous hearings before him. All of which proceedings have occupied the working time of your petitioners and their attorneys and counsel and were proceedings involving the immediate physical possession and control of its own property by your petitioner American Steel
54 Barrel Company and the rights and personal liberty of your petitioner Elizabeth C. Seaman, and all of which labor, costs and exertion arose from the reopening of a proceeding by way of mere motion and not by suit, twice previously decided by District Judge Chatfield in favor of your petitioners, and so that your petitioners were practically physically unable sooner to apply to this Honorable Court for its said rule to show cause, dated March 3rd, 1913, if indeed your petitioners had been advised of their right so to apply prior to the time mentioned in paragraph Fifteenth of your petitioners' petition herein.

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WHEREFORE, your petitioners pray for the relief 55
in the petition herein prayed for.

Dated, N. Y., April 14th, 1913.

AMERICAN STEEL BARREL COMPANY,
by ELIZABETH COCHRANE SEAMAN,
President.

ELIZABETH COCHRANE SEAMAN,
Petitioners.

A. B. BROWNE,
Attorney for Petitioners.

JOHN C. SPOONER,
A. B. BROWNE,
Of Counsel.

56

STATE OF NEW YORK, }
County and City of New York, } ss.:

ELIZABETH C. SEAMAN, being duly sworn, says that she is President of the American Steel Barrel Company, one of the petitioners herein, and individually is the other petitioner herein; that she has read the foregoing traverse and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters she believes it to be true.

That the reason why this traverse is not verified by the American Steel Barrel Company, one of the petitioners, is because the said petitioner American 57
Steel Barrel Company is a corporation and this deponent is President of the same.

ELIZABETH COCHRANE SEAMAN.

Sworn to before me this 14th }
day of April, 1913. }

CHARLES E. RAMIREZ,
Notary Public, N. Y. County.

[SEAL.]

58 **Exhibit G.**

At a Stated Term of the District Court of the United States of America, for the Eastern District of New York, held at the United States Court Rooms, in the Borough of Brooklyn, City of New York, on the 22nd day of May, A. D. 1912.

Present:

The Honorable THOMAS I. CHATFIELD and VAN VECHTEN VEEDER,
District Judges.

In the Matter of requesting the
59 Judges of the Southern District of New York to perform the duties of Judge of this District.

WHEREAS, it is provided by Section 97 of the Act of Congress, approved March 3, 1911, known as the Judicial Code, that "The judge of any district in the State of New York may perform the duties of the judge of any other district in such State upon request of any resident judge entered in the minutes of his court; and in such cases such judge shall have the same powers as are vested in the resident judge."

60 NOW THEREFORE, it is upon request of Thomas I. Chatfield and Van Vechten Veeder, resident judges of the United States District Court for this district;

ORDERED, that the Honorable Julius M. Mayer, Judge of the District Court of the Southern District of New York, be authorized by this request and designated, and is so authorized and designated to perform the duties of Judge of this District at all times and that this order be entered in the minutes of the Court.

THOMAS I. CHATFIELD,
VAN VECHTEN VEEDER,
United States District Judges.

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Exhibit H.

61

At a Term of the United States District Court for the Eastern District of New York, held at the Post Office Building in the Borough of Brooklyn, City of New York, in said District, on the 5th day of February, 1913.

Present:

Hon. JULIUS M. MAYER,
Judge.

IN THE MATTER
OF
IRON CLAD MANUFACTURING COMPANY,
Bankrupt.

62

An amended and supplemental petition having been filed herein by Alexander Hargreaves Brown and others, composing the firm of Brown Brothers & Company, petitioning creditors, herein, on December 15th, 1911, praying for an order or decree directing Elizabeth C. Seaman, her agents and attorneys, 63
to deliver to the Iron Clad Manufacturing Company, bankrupt, or its Receiver or Trustee in Bankruptcy, all the shares representing the capital stock of the American Steel Barrel Company, and for other relief, and an answer thereto having been filed by the said Elizabeth C. Seaman and the American Steel Barrel Company, and the issues so arising having been thereafter referred to Philip J. McCook, Esq., as Special Master, before whom the said proceeding is now pending, and an order to show cause having been made herein on the 23rd day of January, 1913, and duly served upon the said Elizabeth

C. Seaman and the American Steel Barrel Company, requiring them to show cause before a term of this Court to be held on the 27th day of January, 1913, at 5:30 o'clock in the afternoon, why an order should not be made and entered herein restraining the said Elizabeth C. Seaman and the American Steel Barrel Company and its officers agents and attorneys from paying any accountant, attorney or counsel fees, or court costs, out of the bank account, funds, resources or assets of the American Steel Barrel Company, and said matter having come duly on to be heard before me upon the return day of said order to show cause, and after hearing Edwin T. Rice, Esq., and Luke Vincent Lockwood, Esq., attorneys and of counsel for Adolph Kiendl, Esq., Trustee, and Louis O. Van Doren, Esq., and James A. Allen, Esq., on behalf of the said Elizabeth C. Seaman and the American Steel Barrel Company.

Now, on reading and filing the said order to show cause, dated January 23rd, 1913, and on the amended and supplemental petition of December 15th, 1911, therein recited, and upon all the proceedings subsequently taken upon the amended and supplemental petition, and recited in the said order to show cause, and on reading and filing the affidavits of Edwin T. Rice, Esq., and Luke Vincent Lockwood, Esq., verified the 23rd day of January, 1913, upon which said order to show cause was granted, upon the affidavits of Louis O. Van Doren, verified on or about the 27th day of January, 1913, and of Elizabeth C. Seaman, verified the 27th day of January, 1913, and on motion of Edwin T. Rice, Esq., and Luke Vincent Lockwood, Esq., attorneys for the Trustee herein, it is

ORDERED, That the American Steel Barrel Company and its officers be, and they hereby are, authorized and empowered to pay as and for attorney and counsel fees and expenses, to be incurred solely in the matter of the prosecution of the defense of a

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proceeding now pending upon the amended and supplemental petition above recited, filed herein December 15th, 1911, and the answer thereto, the sum of not exceeding Three thousand dollars ($3,000.00) such amount to be expended upon vouchers showing to whom and for what the said payments are made, and to be without affecting or impairing the obligation (if any) of all attorneys and counsel and persons receiving such payments from the American Steel Barrel Company to account therefor to Adolph Kiendl, Esq., as Trustee of the Iron Clad Manufacturing Company, bankrupt, in the event that the said Trustee shall obtain an order or decree adjudging that the American Steel Barrel Company is an asset of the Iron Clad Manufacturing Company, bankrupt, and without prejudice to the right of the respondent to apply for any further order or orders; and it is 67 68

FURTHER ORDERED, That the American Steel Barrel Company may pay a further amount, not exceeding the sum of one thousand, one hundred dollars ($1,100.00) to the accountants employed by it in this proceeding; such payment to be made without affecting or impairing the obligation (if any) of said accountants to account therefor to Adolph Kiendl, Esq., as Trustee of the Iron Clad Manufacturing Company, bankrupt, in the event that the said Trustee should obtain an order or decree adjudging that the American Steel Barrel Company is an asset of the Iron Clad Manufacturing Company, bankrupt; and it is 69

FURTHER ORDERED, That the American Steel Barrel Company be authorized and empowered to execute and deliver a bond or undertaking to James A. Allen, Esq., in the sum of ten thousand dollars ($10,000.00) to secure to the said James A. Allen, Esq., the payment of any attorney or counsel fees which may be found to be due; such bond to be so conditioned that any obligation created or payment to be

70 made thereunder, shall be without affecting or impairing the obligation (if any) of the said James A. Allen to account to Adolph Kiendel, Esq., as Trustee of the Iron Clad Manufacturing Company, bankrupt, for any amount received from the said American Steel Barrel Company, in the event that the said Trustee shall obtain an order or decree adjudging that the American Steel Barrel Company is an asset of the Iron Clad Manufacturing Company, bankrupt; and it is

FURTHER ORDERED, That save for the payments so authorized, and until the further order of this Court, the said Elizabeth C. Seaman, as president of the American Steel Barrel Company, and the
71 American Steel Barrel Company and its officers, agents and attorneys, be, and they hereby are, restrained and enjoined from paying any further or other accountant, attorney or counsel fees or court costs out of the bank account, funds, resources or assets of the American Steel Barrel Company.

Enter:

JULIUS M. MAYER,
U. S. D. J.

Exhibit I.

UNITED STATES SUPREME COURT.

72

Ex parte AMERICAN STEEL BARREL COMPANY and ELIZABETH C. SEAMAN,
Petitioners.

STATE OF NEW YORK,
City and County of New York, } ss:

WILLIAM F. WEISS, being duly sworn, says:

That I am a Certified Public Accountant, and a member of the firm of Macpherson, Weiss & Com-

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pany, of New York and with an office also in 73
Detroit.

That I had, with my assistants, prior to March 3rd, 1913, spent many weeks in making an examination of the books and accounts of Iron Clad Manufacturing Company and American Steel Barrel Company, and that on the said 3rd day of March, 1913, I attended before Special Master Philip J. McCook, prepared to testify as to said books of the American Steel Barrel Company, their contents, nature and system, the changes in their methods and system, the nature of the transactions recorded between said Iron Clad Manufacturing Company and said American Steel Barrel Company, and prepared to testify that the relation between the 74
two companies since 1905, up to the time of the filing of the petition in bankruptcy herein against the Iron Clad Manufacturing Company on the 23rd day of May, 1911, was that of debtor and creditor and that as the result of such transactions and relations the American Steel Barrel Company was the creditor and the Iron Clad Manufacturing Company was the debtor.

I was also prepared to testify and to show the grounds of my testimony and the figures and entries and claims based thereon sustaining the same, that on the 23rd day of May, 1911, the date of the filing of the petition in bankruptcy against the Iron Clad Manufacturing Company according to said figures 75
and entries and claims based thereon the said Iron Clad Manufacturing Company was indebted to the said American Steel Barrel Company in the approximate sum of Four hundred thousand ($400,000.) Dollars.

WILLIAM F. WEISS.

Sworn to before me this
14th day of April, 1913.

CHARLES E. RAMIREZ,
Notary Public,
New York County.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1912.

Ex parte—AMERICAN STEEL BARREL COMPANY and ELIZABETH C. SEAMAN, Petitioners.

Supplemental Brief in Support of Petition for Writ of Mandamus.

These pages are intended to supplement the argument of the brief heretofore filed on the following propositions:

I.

That the affidavit of bias and prejudice does not comply with Section 21 of the Judicial Code.

II.

That Section 21 does not apply to the bankruptcy proceedings herein; and

III.

That mandamus is the proper and only remedy open to petitioners.

However, before entering upon the argument in support of these propositions, it is necessary to summarize the returns of the respondents and the traverse of the petitioners thereto. It should be noted that no material fact of the petition is

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traversed in the returns, which must, therefore, be considered as in the nature of pleas in confession and avoidance.

The return of Judge Chatfield recites: that he has hitherto failed to enter an order on his opinion of March 15, 1912 (194 Fed. Rep., 906), because of the order of Judge Lacombe, dated April 2, 1912 (Petition, 41-42), and the restraining order of Judge Mayer, dated April 22, 1912 (Petition, 43-45), and in order "to avoid complicating the proceedings before Judge Mayer," in view of the latter's statements in his opinion of April 15, 1912 (Return of Judge Mayer, Ex. A, 17-18); that since March 29, 1912, he has treated all matters relating to the bankruptcy proceedings as before Judge Mayer under the order of Judge Lacombe, dated April 2, 1912, and his own order of May 22, 1912, under Section 97 of the Judicial Code; and that "he could and would controvert and deny the various matters" charged in the affidavit of bias.

The return of Judge Lacombe states: that the order of April 2, 1912, transferring the proceedings to Judge Mayer, was made by him "in the exercise of his judicial discretion, and under the authority conferred by Section 21 of the Judicial Code," Judge Veeder of the Eastern District of New York having theretofore requested "to be relieved from acting further in such bankruptcy proceedings;" that during the course of the proceedings before Judge Mayer the Barrel Company and Mrs. Seaman were adjudged to be in contempt for failure to produce certain books and records of the Barrel Company as required by the order of that Judge, which judgment of contempt was revised by the Circuit Court of Appeals, resulting in a reversal as to Mrs. Seaman and in an affirmance as to the Barrel Company; and that no steps were taken by petitioners to secure a revision of the order of April 2, 1912, by the Circuit Court of Appeals.

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The return of Judge Mayer alleges: that he is exercising jurisdiction over the bankruptcy proceedings pursuant to the order of Judge Lacombe, dated April 2, 1912; that on April 12, 1912, he announced his opinion in favor of the motion of the creditors for the reference to a master of the question of the *bona fides* of the Barrel Company's ownership of its property and assets, and on April 22, 1912, entered an order thereon, since which last date the special master has proceeded with the hearings, under that order, on at least fifty days, beginning April 29, 1912, and ending March 7, 1913, during which time "upwards of 2,072 pages of testimony have been taken;" that the hearings were delayed by the failure of the Barrel Company and Mrs. Seaman to produce certain books and records, for which failure the former was fined $2,500 and the latter $3,000, together with a jail sentence of 20 days, a stay being granted to make possible a review in the Circuit Court of Appeals; that since April 2, 1912, petitioners have appeared before him by counsel, argued motions and sought rules to show cause; that the claims against the bankrupt amount to about $600,000, while the assets in the hands of the trustee amount to only $10,000, and that Mrs. Seaman owns all of the stock of the bankrupt company, of which she is president and treasurer, and claimed, until shortly before the bankruptcy proceedings to own all of the stock of the Barrel Company, of which she is likewise president and treasurer; that petitioners had acquiesced in all of his orders up to January 29, 1913, except where they sought a review in the Circuit Court of Appeals, and had made no objection to the conduct of the proceedings prior to that date; that at the time of the granting of the rule herein, a number of motions relating to the administration of the bankrupt estate were pending, five matters being specified, three of which relate to allowances of counsel

fees, one to the renewed punishment of Mrs. Seaman for contempt, and one to the payment by the Barrel Company of the fine imposed for its contempt of Court; that since he has presided over the bankruptcy proceedings no one other than Mrs. Seaman has appeared before him claiming any interest in the Iron Clad Company or in the Barrel Company, though one George A. Wheelock, claiming to own the capital stock of the Barrel Company, has been represented in the proceedings by counsel, whose request to withdraw his appearance, made at the instance apparently of Mrs. Seaman, was denied; and that the entire proceeding has been a contest between the trustee in bankruptcy and Mrs. Seaman.

The traverse of the petitioners to the returns of respondents sets out: (*a*) *as to the return of Judge Chatfield*, that said Judge refused to continue jurisdiction over the bankruptcy proceedings solely because of the filing of the affidavit of bias; that Judge Mayer's restraining order of April 22, 1912 (Petition, 43-44) has deprived petitioners of the benefit of Judge Chatfield's decision of March 15, 1912 (194 Fed. Rep., 906); and that the order of May 22, 1912, entered in the minutes of the District Court for the Eastern District of New York, in attempted compliance with section 97 of the Judicial Code, purporting to authorize Judge Mayer to act as judge of the eastern district for all purposes and at all times, can have no reference to the bankruptcy proceedings herein, which were transferred to Judge Mayor long prior thereto, and is void; (*b*) *as to the return of Judge Lacombe*, that petitioners objected to the jurisdiction of Judge Mayer to hear the bankruptcy proceedings, under the designation of April 2, 1912, continuously from the very outset of those proceedings before that Judge; that the creditors made no attempt by appeal or otherwise to secure a review of the opinion

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of Judge Chatfield of March 15, 1912 (194 Fed. Rep., 906); that the books and records for the failure to produce which petitioners were adjudged to be in contempt of court, were not in petitioners' possession at the time of the orders requiring their production, but were produced in court by petitioners immediately after they were surreptitiously placed, by unknown persons, in the vestibule of Mrs. Seaman's residence; and that an examination of those books by expert accountants disclosed the fact that the Barrel Company is creditor of the bankrupt to the extent of about $400,000; (*c*) *as to the return of Judge Mayer,* that petitioners have not at any time acquiesced in the designation of Judge Mayer under the order of April 2, 1912, but, on the contrary, have reserved objections to that order at every stage of the proceedings; that because of the rapidity and assiduity with which the proceedings have been carried on before the special master by numerous counsel for the creditors and under restraining orders directed against petitioners, it was physically impossible to make application to this Court for the writ of mandamus sooner than was done; that the remark of Mrs. Seaman quoted at page 24 of Judge Mayer's return was not made of the books, for the non-production of which she was adjudged in contempt, but of certain other books which were produced in court immediately after the remark was made; that the books concerned in the contempt proceedings were removed and detained by unknown persons and returned and produced in court as stated in the traverse of Judge Lacombe's return; that the Barrel Company, Mrs. Seaman, and her mother are large creditors of the Iron Clad Company; that the receiver and trustee in bankruptcy have received assets valued at about $42,000.00, and that there is still in the trustee's possession property valued at more than $63,000.00; and that the bank-

ruptcy proceedings herein are not a controversy between the trustee of the bankrupt and Mrs. Seaman as the owner of the capital stock of the bankrupt corporation and the Barrel Company, and as an officer of those companies, but that all the stock of the Barrel Company except one share is and has been since April 11, 1911, owned by George A. Wheelock, whose non-appearance before Judge Mayer is accounted for by the fact that he is now and has been sojourning in France. The traverse concludes with a statement showing the impossibility of applying to this court for the writ of mandamus sooner than was done.

I.

The affidavit of bias and prejudice does not comply with Section 21 of the Judicial Code.

A.

The affidavit was filed too late.

Section 21 of the Judicial Code, under which the transfer herein is sought to be sustained, is admittedly new so far as federal legislation is concerned. Its clear language requiring the affidavit to be filed "not less than ten days before the beginning of the term of the court" manifests an intention not to sanction the disqualification of a judge at the stage of a case that the bankruptcy proceeding herein had reached when the affidavit was filed. This construction of the section is fortified further by the decisions of courts of the several states, which, either at common law or by statute, permit the disqualification of a judge for bias, prejudice or interest, or a change of the venue of a suit or pro-

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ceeding. These decisions uniformly require that the objection to the judge or the motion for change of venue must be made at the very outset of the case. See 4 Encyc. Pl. and Pr., 426-428, and cases there cited. It is believed that no case can be found in which a change of judge or venue was allowed after the presiding judge had written his opinion in the case, and only the formal entry of an order thereon remained to be made.

The common law rule is stated as follows in the case of *P. C. C. & St. L. Ry. Co.* v. *Austin,* 141 Ky., 722, 725:

> "It is a fundamental rule of the common law that an objection to the judge must be made at the threshold, and if not so made is waived."

In those states where a statute similar to Section 21 is in force, the courts hold that the affidavit of bias must be filed at the outset of a case or proceeding, even though the statute itself is silent as to the time of the filing of the affidavit.

KENTUCKY:

> Gen. Stats., ch. 28, Art. 7, Sec. 1; applied in *German Ins. Co.* v. *Landram,* 88 Ky., 433, 440; *Dupoyster* v. *Ft. Jefferson Imp'v't Co.'s, Receiver,* 121 Ky., 518, 521; *Bales* v. *Farrell,* 20 Ky., Law Rep., 1564, 1565.

WASHINGTON:

> Laws 1911, ch. 121, Sec. 1-2; applied in *State ex rel.* v. *Clifford,* 65 Wash., 313; 118 Pac., 40, 41-42.

WISCONSIN:

> Rev. Stat., ch. 123, Sec. 8; applied in *Swineford* v. *Pomeroy,* 16 Wis., 553; *Duffy* v. *Hickey,* 68 Wis., 380.

WYOMING:

> Laws of 1869, ch. 75, Sec. 59, pp. 517-518; applied in *Dolan* v. *Church,* 1 Wyo., 187, 189-190.

If, therefore, the language of Section 21 should be considered to be at all ambiguous, that section should be construed in conformity with the principle of the above cases as well as in accordance with the common law rule requiring objection to a judge to be made at the threshold of the case.

In the main brief it is argued that if Section 21 applies to the bankruptcy proceedings herein, and is constitutional, the affidavit of bias should have been filed not later than ten days before the first Wednesday in June, 1911, the beginning of the term of court in which the bankruptcy of the Iron Clad Company was first to be tried, and should not have been filed in any event, later than ten days before the beginning of the December, 1911, term of the District Court, at which term the hearing was had on the amended and supplemental petition for the extension of the receivership (Brief, pp. 6-15). It is now submitted that the only time the affidavit could have been filed conformably to the imperative language of Section 21, that "every such affidavit * * * shall be filed not less than ten days before the beginning of the term of court" was not less than ten days preceding the June, 1911, term of the District Court, during which the first hearings in the bankruptcy proceedings were had. This conclusion follows from the principle of law that because of the peculiar nature of bankruptcy proceedings there are no terms of District Courts as courts of bankruptcy.

In *Sandusky* v. *National Bank,* 23 Wall., 289, 292-293, the Court said:

> "A proceeding in bankruptcy from the time of its commencement, by a filing of a

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> petition to obtain the benefit of the act, until the final settlement of the estate of the bankrupt, is but one suit. The District Court, for all the purposes of its bankruptcy jurisdiction, is always open. *It has no separate terms.* Its proceedings on any pending suit are, therefore, at all times open for re-examination upon application therefore in an appropriate form. Any order made in the progress of the cause may be subsequently set aside and vacated upon proper showing made, provided rights have not become vested under it which will be disturbed by its vacation."

In the above case the court was speaking of the bankruptcy act of 1867. But this language of the court has been adopted as construing correctly the bankruptcy act of 1898, under which the bankruptcy proceedings herein were initiated. It was so adopted in *In Re Lemmon & Gale Company,* 112 Fed. Rep., 296, 300, in which case the opinion was handed down by Mr. Justice Day and concurred in by Mr. Justice Lurton and by Judge Severens; likewise in the case of *In Re Ives,* 113 Fed. Rep., 911, 913, in which Mr. Justice Day and Mr. Justice Lurton sat.

Petitioners submit, therefore, that if Section 21 applies to the bankruptcy proceedings herein, the affidavit should have been filed not later than ten days before the first Wednesday of June, 1911, the day of the beginning of the term of the district court as such, in which the bankruptcy of the Iron Clad Company was first to be tried in the bankruptcy division thereof. In point of fact, however, the affidavit was not filed until March 29, 1912, nine months too late, at which time the bankruptcy proceedings were well under way. This objection to the affidavit herein is not a technicality. The nature of Section 21 is such that a literal compliance with its terms should be required. In the case of *Henry* v. *Speer,* 201 Fed. Rep., 869, an affidavit was

held insufficient because it failed to state that the bias and prejudice of the judge was a personal one, as provided for by the statute. At page 872 the Court stated the rule of construction to be applied to Section 21, as follows:

> "Owing to the nature of the statute and its liability to abuse, we are inclined to hold those seeking to avail themselves of it to a strict and full compliance with its provisions."

B.

The facts alleged in the affidavit in connection with other facts of record herein fail to show that Judge Chatfield was biased.

Examination of the affidavit of alleged bias and prejudice on which the removal was sought, discloses that every fact therein averred developed in the course of the bankruptcy proceedings *solely*. The last alleged fact of bias was the renewed refusal of Judge Chatfield to refer the extension proceedings to a Master for hearing on the facts. The opinion of Judge Chatfield, filed on March 15, 1912 (194 Fed. Rep., 906), refusing to so refer the matter, will be searched in vain to discover any evidence of alleged bias or prejudice whatsoever. In that opinion Judge Chatfield reviews the adjudicated cases pertinent to the inquiry; states the controlling rule thus judicially established; analyzes the facts then appearing before him upon the pleadings and proof, and thereon concludes:

> "Under these circumstances and bearing in mind that the American Steel Barrel Company now claims a large debt from the Iron Clad Manufacturing Company, and that in endeavoring to prove this claim it will be necessary for the American Steel Barrel Company to show the amount which it previously owed to the Iron Clad Manufacturing Company, or which had been in-

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vested in the American Steel Barrel Company by the Iron Clad Manufacturing Company, and that these amounts have been paid, it is impossible to conclude that a bona fide claim of title cannot exist on the part of the respondents to the property as to which these questions arise. The only basis for such a claim would be the joinder of all these property rights in Mrs. Seaman, at the time when the alleged fraudulent act by her are said to have occurred. But as the companies and she herself were then abundantly solvent, and no reason for fraud has been shown, her claim of title cannot be held to be merely colorable, and the demand by Mrs. Seaman and the American Steel Barrel Company, that the creditors should not obtain this property without suit, must be sustained.

"As to the stock held by Mrs. Seaman, the question is apparently even more simple. A very difficult matter of bookkeeping is shown, and a very difficult question of fact is presented as to whether Mrs. Seaman owed money to the Iron Clad Manufacturing Company, or whether the Iron Clad Manufacturing Company owed money to Mrs. Seaman. It depends upon the alleged criminal acts of many people. This cannot be determined upon this motion. Her claim to the capital stock, and that of Mr. Wheelock as her successor, or her claim to the proceeds thereof, is such that the creditors can ask no more than that she be temporarily restrained, and that now Mr. Wheelock be temporarily restrained, from disposing of his capital stock without notice or consent of this court under the circumstances. In the same way the American Steel Barrel Company should be restrained from disposing of its property as a whole, and the trustee should be given opportunity to substantiate his claims against that company, with the certainty that the assets will not be removed beyond the reach of the court; but further than that the court cannot go.

> "The objection to a summary proceeding to determine the claim of title of third parties in possession must be sustained."

It will thus be sharply noted that Judge Chatfield clearly pointed out that the creditors were entitled and could have an order temporarily restraining Mrs. Seaman and Mr. Wheelock, claiming as purchaser of the capital stock of the company, from disposing thereof "without notice to or consent of this court under the circumstances," and that the American Steel Barrel Company should be restrained from disposing of its property until the trustee should have opportunity to substantiate his claims against that company. It is hence plain that the property would be thus kept preserved while *title* thereto should be determined in a plenary suit where the issues could be tried out according to the law of the land. The petitioning creditors thus had abundant opportunity, with complete preservation of the *res* pending such judicial determination. Refusing to follow that remedy, they persisted in the effort to determine ownership of property by summary proceeding in bankruptcy, and charged personal bias and prejudice against Judge Chatfield for a course of conduct in every way harmonizing with the law as judicially determined; with the facts as impartially reviewed by him, and with the resulting ample opportunity to determine the question of ownership by a plenary suit in accordance with the law of the land. How can bias or personal prejudice be affirmed against Judge Chatfield upon such a record? Petitioners feel constrained to bring these facts to the attention of the court because they distinctly disclose the unbiased action of a judge seeking to accord to litigants before him that due protection of the law which is the prime essential in the exercise of all judicial power.

II.

Section 21 does not apply to the bankruptcy proceedings herein.

Furthermore, it is submitted that the cases cited demonstrate the inapplicability of Section 21 to bankruptcy proceedings in general. It is true that the language of the first sentence of Section 21, "any action or proceeding, civil or criminal," is sweeping in scope, but the specific provision requiring the affidavit of bias to be filed within a stated time with reference to *"the term of the court"* shows that Section 21 was intended to apply only to *term cases* and *term proceedings*. Because of the rule, established by the cases *supra*, that the district courts as courts of bankruptcy have no terms, but are always open, it follows that Section 21 can have no application to bankruptcy proceedings, which are not term proceedings.

Moreover, inasmuch as there are usually numerous parties to a bankruptcy proceeding, and inasmuch as Section 21 allows each party to file one affidavit of disqualification, if that section applies to such a proceeding, the parties might by filing affidavits *seriatim* effectively bring about a gross miscarriage of justice such as Congress did not contemplate in enacting Section 21.

It is submitted, therefore, in addition to the contention of the main brief, that Section 21 has no application to the bankruptcy proceedings herein because those proceedings were begun six months before that section went into operation, that Section 21 does not apply to bankruptcy proceedings in general, and is consequently not applicable to the proceedings herein, because of the two reasons above amplified.

III.

Mandamus is the proper and only remedy open to petitioners.

A.

Mandamus is the only remedy open to petitioners.

The fifth paragraph of Judge Lacombe's return recites that "no petition or application was filed in the United States Circuit Court of Appeals to revise the order of April 2, 1912," and seems to suggest therein that petitioners had other means of relief than mandamus. That order could have been so revised only if it is within the scope of Section 24-b of the bankruptcy act, which provides:

> "The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved."

This section in unmistakable language provides for the revision only of the proceedings of the bankruptcy court itself. The order of April 2, 1912, was not a proceeding of an inferior court of bankruptcy within the meaning of the above section for the obvious reason that it was not an order of the Judge of the court of bankruptcy, Judge Chatfield, but of the senior circuit Judge of the circuit, Judge Lacombe. While that order was entered in the course of the bankruptcy proceedings and affected them, it did not relate directly to the administration of the assets of the bankrupt, was entered by a Judge who, previous thereto, had had nothing to do with the bankruptcy matter in the trial court, and is therefore not within the letter of Section 24-b.

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But conceding the order of April 2, 1912 to be, what it plainly is not, a part of the proceedings of the bankruptcy court itself, it is submitted that that order is none the less not revisable under Section 24-b, *supra*. Not all orders of a bankruptcy court may be reviewed under that section, but only such as arise under the bankruptcy act, are peculiarly of a bankruptcy character, and directly affect the administration of the assets of the bankrupt. 1 Fed. Stats. Ann. 595 ff.; 1 Fed. Stats. Ann (1912 Supp.) 614 ff. The distinction between orders revisable under Section 24-b and those not so revisable is stated as follows in the case of *Moorehouse* v. *Pacific Warehouse & Steel Co.*, 177 Fed. Rep., 337, 339-340:

> "It is conceivable that the line of demarcation between 'proceedings in bankruptcy' and controversies at law and in equity, arising 'in the course of bankruptcy proceedings,' may in some cases be obscure; but generally speaking the former include all questions arising in the administration of the bankrupt's estate, such as the appointment of receivers and trustees, orders requiring the bankrupt to surrender property of the estate in bankruptcy, orders requiring the bankrupt's voluntary assignee to surrender property of the estate, orders giving priority to the claim of a creditor, orders directing a set-off of mutual debts, and orders confirming the composition. These are questions which, with a view to the prompt administration and distribution of the assets of a bankrupt, the law permits to be summarily disposed of by revision. The latter include all controversies and questions arising between the trustee and adverse claimants of property as property of the estate, whether the property be in his possession or theirs. The order which is sought to be reviewed in the present case is one made in a proceeding for contempt. It was not made with a view

> to obtain possession of property of the bankrupt, or to enforce a prior order of the court, but it is a criminal proceeding to punish by fine or imprisonment those who have been guilty of violating an injunction of the court. Such a proceeding has nothing to do with the estate in bankruptcy. It is the exercise of the court's power to preserve order in its judicial proceedings and enforce its own orders. It is a proceeding prosecuted for the benefit of the government, the courts, and the public."

The order of April 2, 1912, was not one peculiar to a bankruptcy proceeding, but might have been entered in any case upon a proper showing, since Section 21 of the Judicial Code, under which the transfer herein was attempted to be justified, expressly applies "to any action or proceeding, civil or criminal," and that order was not, therefore, subject to revision as provided in Section 24-b of the Bankruptcy Act.

Furthermore, the order of April 2, 1912, could not have been reviewed on appeal to the Circuit Court of Appeals. Section 25-a of the Bankruptcy Act, under which appeals may be taken in bankruptcy proceedings to the Circuit Court of Appeals, provides as follows:

> "That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the Territories, in the following cases, to wit, (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be."

It needs no argument to show that the order directing the transfer of the bankruptcy proceedings to Judge Mayer, was not within the scope of the above section.

Finally, it is submitted that petitioners had no right to relief in the Circuit Court of Appeals by way of mandamus. While it is true that the rule of the earlier cases—see *United States ex rel. Herless* v. *Judges of the U. S. Court of Appeals of Indian Territory*, 85 Fed. Rep., 177, and *Rosenbaum* v. *Bauer*, 120 U. S., 450—to the effect that circuit courts of appeals cannot exercise jurisdiction to grant mandamus except in aid of their own jurisdiction, and unless their jurisdiction has already attached, has been modified somewhat by later cases, petitioners submit that even under the rule as modified they were not entitled to the writ of mandamus from the Circuit Court of Appeals. The modified rule is stated as follows in *McClellan* v. *Carland*, 217 U. S., 268, 279-280:

> "There are expressions in opinions of this court to the effect that such writs issue in aid of a jurisdiction actually acquired. But we think it the true rule that where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below."

If Judge Chatfield had entered an order on his opinion of March 15, 1912, that order, it is true, could have been reviewed by the circuit court of appeals under Section 24-b of the Bankruptcy Act, and the case was therefore "within the appellate jurisdiction of the higher court." But the action of Judge Chatfield in refusing to continue jurisdiction over the bankruptcy proceedings is not unauthorized within the meaning of the rule announced

in *McClellan* v. *Carland, supra.* On the contrary, it finds sanction in the order of April 2, 1912, an order, be it noted, entered by the senior judge of the appellate court to which the petition in mandamus would have to be addressed. Furthermore, the action complained of is not primarily "the unauthorized action *of the court below.*" The source of petitioners' difficulties is not so much Judge Chatfield's refusal to continue to preside over the bankruptcy proceedings herein as it is the order of Judge Lacombe designating Judge Mayer to take jurisdiction of those proceedings and the subsequent action of Judge Mayer in conformity therewith. Certainly the remedy by mandamus from the circuit court of appeals, if open to petitioners, is wholly inadequate in view of the fact that the order attacked is that of the senior judge of that court. This fact differentiates the case from *Henry* v. *Speer,* 201 Fed. Rep., 869, where the circuit court of appeals reviewed, in a mandamus proceeding, *the order of a district judge refusing to retire from a case upon the filing of an affidavit of bias under Section 21 of the Judicial Code.*

It is submitted, therefore, that petitioners are, and have been at all times since the entry of the order of April 2, 1912, without right to relief in the circuit court of appeals either (*a*) on petition or application to revise that order, or (*b*) on appeal therefrom, or (*c*) by mandamus directing its vacation. The conclusion necessarily follows that unless petitioners are entitled to the writ of mandamus from this court they are remediless. This leads directly to a consideration of the propriety of issuing the writ under the facts of record in this proceeding, to secure the relief prayed for in the petition.

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B.

Mandamus is the proper remedy under the circumstances of this case.

1. *Petitioners are not attempting to control judicial discretion by mandamus.* The second paragraph of Judge Lacombe's return recites that the order of April 2, 1912, transferring the bankruptcy proceedings to Judge Mayer, was made "in the exercise of his judicial discretion." Petitioners admit that mandamus will not issue to control an inferior court in the exercise of its legitimate discretion, but are unable to see that this rule of law has any application here. Section 21 of the Judicial Code, in attempted conformity with which the order of April 2nd was entered, does not, by any stretch of construction, confer discretion upon circuit judges in designating the judge who is to take over the case or proceeding to hear or try which the original judge is disqualified, unless indeed it be a discretion as to the particular judge who shall be so designated. This is obviously not the kind of judicial discretion which cannot be controlled by mandamus, neither do petitioners seek to control it here, for their complaint is not that Judge Mayer should not have been designated to assume jurisdiction of the bankruptcy proceedings, but that no judge at all, except Judge Chatfield and his associate, Judge Veeder, had any legal right to assume charge of those proceedings. Section 21 provides that upon the filing of the affidavit the original judge "before whom the action or proceeding is to be tried or heard * * * shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in Section twenty-three, to hear such matter." Sections 20 and 23 provide only the formalities to be observed in the designation of a substitute judge by the

senior circuit judge and in the division of business among judges where there is more than one district judge of a district, respectively. These formalities are set out with precision and leave no room for the exercise of any discretion.

If section 21 confers any judicial discretion, which its imperative and precise language seems to negative, that discretion is to determine the sufficiency of the affidavit of bias and more properly belongs to the trial judge than to the senior circuit judge. In this case, however, neither Judge Chatfield nor Judge Lacombe exercised any discretion in that regard. The certificate of the former entered in the minutes of the court on March 29, 1912 (Petition, Ex. C, 38-40), expressly states that in his opinion "the intent of Section 21 is to cause a transfer of the case, without reference to the merits of the charge of bias." Judge Lacombe's order of April 2, 1912, does not show that any consideration was given by him to the question of the legal sufficiency of the affidavit of bias, and his refusal later to issue a rule to show cause why the order should not be vacated leads necessarily to the inference that in his opinion the mere filing of the affidavit operated *ipso facto* to disqualify the judge against whom bias might be charged. In other words, if Section 21 confers discretion upon either the trial or the senior circuit judge, there was no attempt to exercise that discretion herein and the refusal to do so is a plain abuse of discretion. That an abuse of judicial discretion may be corrected by mandamus was held by this court as recently as the case of *Ex Parte Harding,* 219 U. S., 363.

Moreover, judicial discretion of the sort which it has been conceded, for the purposes of argument, section 21 confers, is not the kind of discretion that cannot be controlled by mandamus.

In the case of *Ex Parte State Bar Association,* 92 Ala., 113, 8 So., 768, the presiding judge refused

to hear proceedings properly before him for the disbarment of an attorney, on the ground that he (the presiding judge) was disqualified by interest. His contention that he was interested was based upon the fact that he was a member of the petitioning Bar Association, and paid annual dues thereto, and that if the Association had to pay the costs of such a proceeding, his distributive share of the property of the Association on dissolution would be diminished. The Court held that these facts did not show disqualification, and that mandamus was the proper procedure to compel the judge to try the case. The Court said (p. 769):

> "One of the original offices of the writ was to compel judicial officers who from whatever cause or upon whatever considerations wrongfully refused to act, to proceed with, hear and determine the case in hand. Their discretion will not be controlled; and in the decision of other questions arising on the trial of a cause, whether of law or of fact, with respect to the rights of the parties litigant in the subject matter involved, they, in the sense of this doctrine, have a discretion the exercise of which will in general be reviewed only on error or appeal when those remedies are adequate. But it can never rest in the discretion of a judge whether he will sit in a given cause. If he is not disqualified under the Constitution, it is his duty to sit; a duty which he cannot delegate or repudiate, and which no consent can devolve upon another. The inquiry is not what he has determined, but what are the facts in regard to his alleged incompetency? Is he in point of fact, as shown by his return to the alternative writ 'for any legal cause' incompetent to hear and determine the case presented?"

In the case of *State* v. *Dick*, 103 Wis., 407, 79 N. W. 421, a situation converse to that in the previous case was presented. In this case there was a

statute which provided that when a change of venue was granted on account of the prejudice of the presiding judge in any civil action pending in D. County, it might in the discretion of the Court be changed to the County Court of D. County unless it should appear that the judge of such county court was prejudiced. It was held that a circuit judge of D. County was bound to send to another circuit an action pending in his court on the plaintiff's affidavit alleging prejudice on the part of the circuit judge and of the judge of the D. County Court, and that mandamus was the proper means of compelling the judge to do so. The Court considered questions of this character as not within the scope of the exercise of judicial discretion. The case of *Crook* v. *Newburg,* 124 Ala., 27 So. 432, is much the same as the case just cited. There the State code provided (§2637) that no judge should sit in any proceeding in which he was related to either party within the fourth degree of consanguinity or affinity. The Court held that mandamus lay to compel a judge to certify his incompetency to the Register in Chancery of the County, in accordance with the provisions of §3381 of the Code.

To the same effect, see *State* vs. *Pitts,* 139 Ala., 152, 36 So., 20, where in a similar situation mandamus was held to be the proper remedy, though the writ was refused because the petition failed to state facts showing the disqualification of the judge.

The theory of these cases is that when a change of venue or designation of another judge is sought on grounds of bias or prejudice or interest, the granting or the refusing of such a change of venue or designation of a substitute judge is not such a discretionary matter as cannot be reviewed by mandamus. Hence, even should § 21 of the Judicial Code be construed to confer upon a judge sought to be disqualified, or upon the senior circuit judge,

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discretionary powers to decide whether or not the affidavit is sufficient, mandamus is none the less the proper remedy to review the action of the judge in deciding that the affidavit is or is not sufficient. This theory is in accord with the holding in the case of *Henry* vs. *Speer*, 201 Fed. Rep., 869, where the decision of the District Judge that the affidavit was insufficient was reviewed on petition for the writ of mandamus, though it is true that the writ was there refused on the ground that the affidavit omitted to state that the bias or prejudice of the judge was a personal one. In the present case, an even stronger situation is presented, inasmuch as Judge Chatfield declined to examine into the sufficiency of the affidavit, the mere filing of which, without more, he considered to disqualify him under § 21.

2. *Petitioners are not guilty of laches.* A large portion of the returns of Judges Lacombe and Mayer consist of a detailed narrative of the proceedings before the latter, and the special master appointed by him, since the order of April 2, 1912. Petitioners submit, however, that the facts so alleged do not warrant the imputation of laches to them. While there has been delay there has been no laches on the part of petitioners.

In cases where the defense of laches is relied upon, these three things must always be considered: (*a*) the length of time which has elapsed since the right sought to be enforced arose; (*b*) the knowledge, or means of knowledge, of the tardy suitor seeking relief; and (*c*) the change of circumstances, if any, making it impossible to put the parties in *statu quo*, and hence inequitable to grant the relief sought.

The importance of the lapse of a long time as an element of laches is emphasized in the following decisions: *Wetzel* vs. *The Minnesota Ry. Co.*, 169

U. S., 237, 241; *United States* vs. *Moore,* 12 How., 209, 222-223; *Lansdale* vs. *Smith,* 106 U. S., 391, 394; *Sena* vs. *United States,* 189 U. S., 223, 241.

Knowledge, or means of knowledge, as an element of laches, is emphasized in these cases: *Burke* vs. *Smith,* 16 Wall., 390, 401; *Foster* vs. *Mansfield, etc., R. R. Co.,* 146 U. S., 88, 89; *Johnson* vs. *Standard Mining Company,* 148 U. S., 360, 370; *Halstead* vs. *Grinnan,* 152 U. S., 412, 417.

The importance of a change in circumstances since the right accrued, making it inequitable to grant the relief sought, is brought out in the following cases: *Galliher* vs. *Caldwell,* 145 U. S., 368; *Abraham* vs. *Ordway,* 158 U. S., 416; *Gildersleeve* vs. *New Mexico Mining Company,* 161 U. S., 573; *O'Brien* vs. *Wheelock,* 184 U. S., 450.

In *Galliher* vs. *Caldwell, supra,* the Court said (p. 373):

> "But it is unnecessary to multiply cases. They all proceed upon the theory that laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties."

In the case of *Chapman* vs. *County of Douglas,* 107 U. S., 348, 355, this Court, speaking more particularly of the application of the doctrine of laches to mandamus proceedings, said:

> "And if, in such cases, a proceeding in *mandamus* should be considered to be the more appropriate, and, perhaps, the only effective remedy, it also is not embraced in the Statute of Limitations prescribed generally for civil actions. The writ may well be refused when the relator has slept upon his rights for an unreasonable time, and especially if the delay has been prejudicial to the defendant, or to the rights of other persons,

> though what laches, in the assertion of a clear legal right, would be sufficient to justify a refusal of the remedy by *mandamus* must depend, in a great measure, on the character and circumstances of the particular case."

In this case about ten months elapsed between the entry of the order of April 2, 1912, and the initiation of this proceeding. But of this time, this court has been in session—and a means of relief open to petitioners—only for six months. There is of course no statute of limitations applicable here, from which by analogy it could be determined how long petitioners might wait with safety, inasmuch as the entry of the order of April 2, 1912, and the declination of Judge Chatfield to proceed further in the bankruptcy matter were not legal wrongs for which an action would lie, and would not, therefore, start a statute of limitations running. Certainly, however, such statutes very rarely, if ever, limit the period for beginning suit to less than a year. Furthermore, the delay, in this instance, is accounted for by the rapidity of the proceedings before the special master, to defend which consumed all of the time and efforts of petitioners' counsel and exhausted the court's allowance of counsel fees (Traverse, 12-13, 17-18). In the light of these circumstances, a delay of ten months, during only six of which relief was practically available, is, it is submitted, insufficient to satisfy the requirements of the doctrine of laches.

Petitioners were, of course, chargeable with knowledge of all the facts that developed in the course of the proceedings, but the allegations of the petition show that through error of their counsel they were not informed of their right to relief by mandamus until shortly before the institution of this proceeding (Petition, 13-14). Petitioners' ig-

norance of their legal rights should be considered as an extenuating circumstance.

But the controlling reason why petitioners should not be charged with laches is that there are no facts of record herein showing that their delay has proved prejudicial to anyone. Certainly it has not prejudiced the respondents. Nor have the creditors been thereby put in a position that will render the granting of the writ unjust to them. Nowhere are there any facts alleged in the returns from which it can be inferred that the creditors will necessarily be successful in their efforts before Judge Mayer to have the receivership extended over the property of the Barrel Company, or that the assets of that company are in danger of being dissipated. Moreover, throughout the entire period of delay the creditors might have brought plenary suit at any time to have the title to the Barrel Company's property ascertained judicially while the *res* was held intact under the opinion of Judge Chatfield of March 15, 1912 (194 Fed. Rep., 906) cited fully, *supra*. It is impossible to imagine any reason why the creditors have preferred, after two unsuccessful attempts, to endeavor a third time to get possession of the property of that company in summary fashion on mere motion in the bankruptcy court, rather than to bring an independent suit for the purpose of settling title to that property by regular jury trial. The absence of facts in the returns justifying reasonable belief that the creditors in the bankruptcy proceeding will be prejudiced by the issuance of the writ is decisive that laches cannot be imputed to petitioners for their delay.

The controlling importance of prejudice as an element of laches in mandamus proceedings is brought out in bold relief by two cases decided by this Court, in the one of which the writ was issued, after a delay of two years, because there was no

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showing of prejudice as a result of the delay, and in the other of which a similar delay was held fatal because of such a showing. The first case is *Duke* vs. *Turner*, 204 U. S., 623, in which the Court reviewed the facts and held that those facts did not disclose laches, in the following language, pages 631-632, which well summarizes the case:

> "Following, then, the rule recognized and approved in *Chapman* v. *County of Douglas*, *supra*, the question is, should the writ be refused because the relator has slept upon his rights for an unreasonable time, and has the delay caused prejudice to the defendant, or to the rights of other interested persons?
>
> "We perceive nothing in the record to warrant that conclusion. Gray, as receiver of the National Bank of Guthrie and successor of Cunningham, to whom the warrants were payable, on September 7, 1895, began a suit in mandamus in Logan County, Oklahoma. He prevailed in that court. The case was reversed on February 12, 1897, by the Supreme Court of the Territory, 5 Oklahoma, 188, and was remanded and refiled in the District Court on April 7, 1897.
>
> "The validity of the act was in controversy in the case of *Guthrie National Bank* v. *Guthrie*, and sustained in this court, April 3, 1899, 173 U. S., 528, reversing the Supreme Court of the Territory.
>
> "On the twenty-eighth day of June, 1901, Turner and Kirkwood, as the successors in interest to Gray, having purchased the warrants, as they allege, on January 5, 1901, filed their motion to dismiss the original action, which was sustained. They then (on June 28, 1901) brought suit against the city of Guthrie for judgment upon the warrants against the city, in which they failed in the District Court, and on appeal to the Supreme Court, that court holding that the remedy, if any, was by mandamus. 13 Oklahoma, 26. On the twenty-third day of July, 1903, this mandamus proceeding was begun.

> "These facts do not disclose any laches in asserting their rights such as would bar the right to obtain a writ of mandamus, nor does it appear that the municipal corporation has been in any wise prejudiced by the delay. In some form legal warfare seems to have been waged for the collection of the warrants by various holders in different courts without beneficial results until the present action."

The other case is *Matter of Eastern Cherokees*, 220 U. S., 83. There the writ was sought to require the Court of Claims to modify its decree, for the distribution of a certain fund among the Eastern Cherokee Indians on a *per capita* basis, so as to conform to the decree of this Court awarding a distribution *per stirpes*. Petitioners waited, however, until the fund had been substantially disbursed. The writ was accordingly refused on the ground that its allowance would require the Government to pay twice.

In the light of these cases, it is submitted that the absence of showing from which an inference is warranted that the issuance of the writ will injure the creditors in bankruptcy, absolves the petitioners of any laches in applying for mandatory relief.

3. *Under the facts of record, mandamus will be an effective remedy.* The return of Judge Chatfield sets forth that since the order entered by Judge Lacombe, transferring jurisdiction of this bankruptcy proceeding to Judge Mayer, he has taken no action therein, assuming such transfer of jurisdiction to have been effected under §21, or if not then within the terms of the order entered in his court on May 22, 1912, and to which special reference is made in the traverse filed by the petitioners, and copy of such order exhibited with such traverse at page 20. That order purports to be based upon the

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concluding provision of §97 of the Judicial Code (36 Stats. Part 1, p. 1120), which reads:

> "The judge of any district in the State of York may perform the duties of the judge of any other district in such State upon the request of any resident judge entered in the minutes of his court; and in such cases such judge shall have the same powers as are vested in the resident judge."

We do not find in the Judicial Code any such provision with respect to any other State. Everywhere throughout the United States, such designation is made by the circuit judge, or in his absence by the circuit justice of the circuit in which the district lies, where another district judge is required to hold court in the event of disability of the judge of such district or the accumulation or urgency of business, as is set forth in §§13 to 19, inclusive of the Judicial Code (36 Stats. Part 1, pp. 1089-90). The provision in §97, therefore, is special legislation, but its use or application, we submit, must be in harmony with the causes requiring such judicial service, as are set forth in §§13 and 14 of the Judicial Code, that is, as relating to (1) the disability of the district judge, or (2) "when from the accumulation or urgency of business in any district court, the public interests require the designation," etc. It is therefore very clear that thus considered, or even as standing alone, the language of §97 was not intended to confer the power of designation without assignment of *any* reason therefor and *without limit* either as to time or subject matter.

The order entered on May 22, 1912, by Judge Chatfield and his associate, District Judge Veeder (Exhibit "G", p. 20 of petitioners' traverse), reads as follows:

> "At a Stated Term of the District Court of the United States of America, for the

Eastern District of New York, held at the United States Court Rooms, in the Borough of Brooklyn, City of New York, on the 22nd day of May, A. D. 1912.

"Present: The Honorable Thomas I. Chatfield and Van Vechten Veeder, District Judges.

"In the matter of requesting the Judges of the Southern District of New York to perform the duties of Judge of this District.

"Whereas, it is provided by §97 of the Act of Congress, approved March 3, 1911, known as the Judicial Code, that 'The Judge of any district in the State of New York may perform the duties of the judge of any other district in such State upon the request of any resident judge entered in the minutes of his court; and in such cases such judge shall have the same powers as are vested in the resident judge.'

"NOW THEREFORE, it is upon the request of Thomas I. Chatfield and Van Vechter Veeder, resident judges of the United States district court for this district;

"ORDERED, That the Honorable Julius M. Mayer, Judge of the District Court of the Southern District of New York, be authorized by this request and designated, and is so authorized and designated to perform the duties of Judge of this District at all times and that this order be entered in the minutes of the Court.

THOMAS I. CHATFIELD,
VAN VECHTEN VEEDER,
United States District Judges."

It will be noted that this is a blanket order, embodying the request of the District Judges Chatfield and Veeder, and designating Judge Mayer "to perform the duties of Judge of this District AT ALL TIMES," and directing "that this order be entered in the minutes of the Court."

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By §14 of the Code, it is plain that the District Judge appointed under the authority thereof to serve in another district must sit within the district to which he is thus named, for the language of that section is that—

> "Such circuit judge or justice may designate or appoint a judge of any other district in the same circuit to have and exercise *within the district* thus named, the same powers that are vested in the judge thereof. Each of the district judges may in case of such appointment hold separately at the same time a district court *in such district*, and discharge all of the judicial duties of the district judge therein."

It is manifest that these designations under §§ 13 and 14 of the Code are not thereby intended to be permanent. For by § 17 the power runs "during the time for which he is so appointed." But in this order of May 22, 1912, two judges of the Eastern District seek to confer blanket authority upon Judge Mayer to *"at all times* perform the duties of a judge in the Eastern District," and thus, by a single order or request, two judges of the Eastern District, without suggestion of any need therefor arising from disability or press of business, attempt to confer upon a named judge for the Southern District the power to there perform all the duties of each such resident judge, and without limit of time. Taking the Judicial Code, in § 13, *et seq.*, and the quoted language of § 97 thereof, we submit that the attempted exercise of power was wholly ineffectual to invest Judge Mayer with jurisdiction in this case, and could not have retroactive operation to legalize his prior acts and orders in this bankruptcy proceeding.

Neither the return of Circuit Judge Lacombe nor District Judge Mayer makes reference to this order, referred to by Judge Chatfield. Judge Mayer's

return bases his exercise of jurisdiction herein solely upon the order entered by Circuit Judge Lacombe on April 2, 1912, upon the assumed authority of § 21 of the Code. When the request or order of May 22, 1912, was entered by Judge Chatfield, this case was not then before him in fact, because, as his return shows, he treated the same as having been transferred from his court by the order of Circuit Judge Lacombe. Hence, although we insist that such order of May 22, 1912, was far in excess of the authority conferred by § 97 of the Code, it could not have been intended to apply to a case then in fact withdrawn from Judge Chatfield's jurisdiction by the prior order of April 2. The validity of these proceedings must therefore be determined as of April 2, 1912, when the order transferring the cause was signed by the Circuit Judge. The order of Judge Mayer in overruling the decision of Judge Chatfield, and referring to a Master the summary proceeding instituted by the creditors to seize the assets and property of the American Steel Barrel Company, was entered on April 22, 1912, and the proceeding has since been conducted on the assumed authority of that order. Hence, in no view could the order entered by Judge Chatfield on May 22, 1912, legalize proceedings taken long prior thereto, and of which these petitioners complained and are seeking relief.

* * * * * *

That the order of May 22, 1912, was far too broad and hence not justified by Section 97, is made plain by observing:

1. That under Sections 13 and 14 of the Judicial Code, the fact of the disability of the district judge (Sec. 13) or "the accumulation or urgency of business in any district court" (Sec. 14) must be made to appear "by the certificate of the Clerk under the seal of the Court" to any circuit judge of the circuit or in their absence to the circuit justice of such

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circuit whereupon the designation and appointment of another district judge is made to act "during such disability" in the one case and "during the time for which he is so appointed" in the other, for Section 19 makes it obligatory on the designated judge to act "during the time for which he is so appointed."

It is hence plain that such designation and appointment cannot be for an indefinite time. But by the terms of the order of May 22, 1912, no reason is assigned for such designation and no limit of time whatsoever is named.

2. Clearly Section 97 was not intended in these regards to be broader than the powers of appointment conferred on the circuit justice or the circuit judges by Sections 13 *et seq.* of the Code. Section 97 is *sui generis* in permitting district judges in New York only to so act by mere request of one of them, but fair interpretation of the language of Section 97, in the light of these general provisions of the Code, relating directly to the same subject, cannot put the extent of the power conferred by Section 97 on the district judges far beyond the limitations contained in Sections 13 *et seq.* upon the like powers of the circuit justice or circuit judges. To so contend would at once not only *displace* these general sections from all application to the State of New York, but put in the hands of the district judges in that State an independent and uncontrolled power denied to the district judges elsewhere throughout the entire federal jurisdiction. Matter of mere convenience or other reasons having no relation to either disability or accumulation or urgency of business which in the public interests required attention, would be sufficient to authorize such designation. We submit Congress did not intend to legislate to any such result. Section 97 should hence be construed as

subordinate to the general provisions of the Code which deal with the same subject, and as requiring like causes to appear of record as justifying designation thereunder and to be limited in purpose and time as by these general sections clearly intended.

3. That Section 97 was intended to have much narrower operation appears from the language thereof. It reads:

> "The judge of any district in the State of New York may perform the duties of the judge of any other district in such State upon the request of any resident judge entered in the minutes of his court; *and in such cases* such judge shall have the same powers as are vested in the resident judge" (italics ours).

Now, the words *"and in such cases"* plainly imply that the request and designation is limited "to such cases" as are designated in such request. Thus construed, Section 97 permits the resident judge to call to his temporary aid the services of another district judge to so act in designated cases. By any other construction the singular and embarrassing result would obtain that in the State of New York alone the general provisions of the Judicial Code on this subject would be entirely controlled and superseded by Section 97, and thus the circuit justice or circuit judges would lose all control of the personnel of the district judges therein. The orderly administration of the law provided for and placed under such superior control throughout the rest of the country would in this single instance be displaced and put beyond such control. The several districts in the State of New York would hence be judicially controlled in precisely the opposite manner to the rule prescribed everywhere else throughout the United States. If such were the result under Section 97, then we repeat, Con-

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gress is subject to the charge of having placed New York wholly without the supervisory power provided for in all other States. We submit Congress did not so intend and its legislation cannot properly be so applied.

That the proceedings before Judge Mayer gain no validity by virtue of the order of May 22, 1912, appears further from the language of the last clause of Section 97, under which that order was attempted to be made, providing that the judge designated as therein prescribed "shall have the same powers as are vested in the resident judge." The question at once arises, "What were the powers of the resident judges of the Eastern District of New York, with respect to the bankruptcy proceedings herein on May 22, 1912?" Those judges were, it is submitted, powerless to act in the matter, because of the order of April 2, 1912, which, until vacated by proceedings initiated by some one of the parties to the bankruptcy suit, operated to deprive both of the resident judges of jurisdiction thereover. Under Section 97, Judge Mayer could acquire no greater power to direct the bankruptcy proceedings than the resident judges of the eastern district possessed, and the order of May 22, 1912, can, therefore, have no relation to those proceedings, however effective it may be as to other matters.

The petitioners do not seek delay by this proceeding. But as Judge Chatfield had carefully heard and fully sustained their contention to have determined, by plenary suit and according to the law of the land, the right and title to the property both claimed by and in the possession of the Barrel Company, they resist the effort to compel that adjudication by summary proceeding in bankruptcy. And as the petitioning creditors could, as expressly ruled by Judge Chatfield, have had the benefit of restraining orders holding the *res* in controversy from any disposal adverse to the creditors, they

were amply protected while the issue of ownership might be tried by independent suit in the proper way open to all other citizens disputing the ownership of property.

Respectfully submitted,

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Office Supreme Court, U. S.
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UNITED STATES SUPREME COURT,

No. 14, ORIGINAL. OCTOBER TERM, 1912.

Ex Parte, AMERICAN STEEL BARREL COMPANY
AND ELIZABETH C. SEAMAN,
Petitioners.

BRIEF FOR RESPONDENTS,

Hon. E. Henry Lacombe and Hon. Julius M. Mayer.

JOHN A. GARVER,
EDWIN T. RICE,
CHARLES A. RIEGELMAN,
Counsel for said Respondents.

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United States Supreme Court.

OCTOBER TERM, 1912.

No. 14, ORIGINAL.

Ex Parte AMERICAN STEEL BARREL COMPANY and ELIZABETH C. SEAMAN,
Petitioners.

BRIEF FOR RESPONDENTS,

Hon. E. Henry Lacombe, Senior Circuit Judge for the Second Circuit, and Hon. Julius M. Mayer, a District Judge of the United States for the Southern District of New York, acting under designation in the Eastern District of New York.

Nature of the application.

Petition for a writ of mandamus, to compel Honorable Thomas I. Chatfield, a District Judge of the United States, for the Eastern District of New York, to sign and enter an order on a decision made by him in the course of the bankruptcy proceedings in the matter of the Iron Clad Manufacturing Company, Bankrupt, and to exercise jurisdiction in the said matter.

(NOTE: The references are to the folio numbers. The last folio number in the moving papers is 134. For convenience, the Returns of Judges Lacombe and Mayer have been folioed continuously, beginning with folio 136).

Incidentally, relief is prayed for, that an order made by Judge Lacombe, on April 2, 1912, designating Judge Mayer to exercise, in the said matter, the powers of a District Judge of the Eastern District, be vacated and set aside, and that all proceedings before Judge Mayer, pursuant to such designation, be vacated and set aside (fols. 44-46). The Court is also asked to direct the "District Judges" to exercise jurisdiction (fol. 46), although Judge Van Vechten Veeder, the other District Judge of the Eastern District, is not made a party to this proceeding.

The statements contained in the affidavit of Thatcher M. Brown, annexed to the petition as Exhibit A, as well as the statements contained in the other Exhibits of the petitioners, must be accepted as true, inasmuch as they are not controverted.

Separate Returns have been made by Judges Lacombe and Mayer. The petitioners have filed a Traverse to these Returns, thus raising various issues of fact.

Statement of facts.

A petition in bankruptcy was filed against the Iron Clad Manufacturing Company, in the Eastern District of New York, on May 23, 1911, and, on that day, Judge Veeder, one of the Judges of the Eastern District, appointed a Receiver (fols. 54-5). An adjudication of bankruptcy against the Company was rendered, after a trial before Judge Chatfield and a jury, upon the direction of the Court, on December 2, 1911 (fol. 13).

In June, 1911, certain creditors of the bankrupt applied to the Court for an extension of the receivership to the capital stock, property and assets of the American Steel Barrel Company, one of the petitioners herein (fol. 14), upon the ground that these assets belonged to the bankrupt (fols. 67-8). The petitioner, Elizabeth C. Seaman, owned all of the

capital stock of both Companies; and she had made statements, under oath and otherwise, upon which she had obtained credit for the bankrupt, that the Barrel Company was merely a subsidiary or department of the bankrupt (fols. 68-71). In September, 1910, she had filed a verified return with the Collector of Internal Revenue, and in November, 1910, an amended return, showing in a single statement the affairs of the Iron Clad Manufacturing Company and the American Steel Barrel Company as one organization; such return and amended return being verified by her as president and treasurer of both corporations; and on September 29th, 1910, she had addressed a letter to the Collector, referring to the said return and stating that the American Steel Barrel Company was a subsidiary company, which had never been separated from the main company, and that it was simply a department and that it was impossible to divide or separate them (fols. 71-72).

That application was heard, on affidavits, by Judge Chatfield, who denied it "for the present" but stated that it might be reheard before Judge Veeder, if the latter would consent to hear it (fols. 72-3). Judge Veeder declined to do this, but suggested that it would be more satisfactory to dispose of the application upon a reference than upon conflicting affidavits (fol. 73). Judge Chatfield declined to direct a reference; and on July 17, 1911, he entered an order denying the application, on the ground that the bankruptcy court could not determine the question summarily. That he did not give the subject any real consideration, but decided it "upon a cursory examination of the papers" appears from a subsequent opinion written by him in March, 1912, reported in 194 Fed. Rep., 906, 917.

The order of Judge Chatfield was reversed by the Circuit Court of Appeals, in November, 1911, on the ground that the petitioning creditors were entitled to have the bankruptcy court make an inves-

tigation summarily to decide whether or not the claim of adverse ownership by the American Steel Barrel Company was merely colorable or made in good faith (191 Fed., 831).

Upon the settlement of the order on the mandate of the Circuit Court of Appeals, Judge Chatfield stated that he would not grant a reference (fol. 75). Owing to the adjudication in bankruptcy and the appointment of the Trustee meantime, an amended and supplemental petition was filed on December 15, 1911 (fol. 76). Thereafter, Judge Chatfield set the matter down for a hearing upon the original record and such further affidavits "or testimony" as might be presented (fols. 76, 107). On the day set for the argument, counsel for the petitioning creditors and Trustee appeared, and again made a request for an order of reference, which was denied, while the time of Elizabeth C. Seaman and others to plead, was further extended (fol. 78).

Thereafter, on January 26, 1912, the matter was submitted to Judge Chatfield, on behalf of the petitioners, upon a brief, which expressly asked that an opportunity be given to take testimony either upon a reference or in open court, upon the issues raised by the papers (fol. 79).

On March 15, 1912, Judge Chatfield filed an opinion (fols. 15–16, 79), in which the statement was made, contrary to the facts set forth in the affidavit of Thatcher M. Brown annexed to the petition herein (fols. 75, 78, 79), that an opportunity had been given to the parties to call witnesses but that they had failed to do so (194 Fed., 906, 909). Thereupon, on behalf of the petitioning creditors and the Trustee, a motion was made, returnable on March 29, 1912, before Judge Veeder, who was then holding Court, to reopen the application for the extension of the receivership and for a direction that the petitioners be permitted to take testimony and that, meantime, no order should be entered upon the decision of Judge Chatfield (fols. 16-17). That

application was referred by Judge Veeder to Judge Chatfield (fols 17, 113-14).

At this point, and before the application for a rehearing was heard by Judge Chatfield (fol. 115), the petitioning creditors filed an affidavit and certificate of bias, under Section 21 of the Judicial Code (fols. 18, 51, 110). Judge Chatfield, while stating that he "might" question many of the statements contained in these papers (fol. 117), did not do so, but declared that he would "proceed no further in this motion" (fol. 116); and he directed the Clerk to send an authenticated copy of his statement to Judge Lacombe, the Senior Circuit Judge of the Second Circuit (fol. 116), apparently assuming that he had no power to pass upon the matter (fol. 118). The Clerk transmitted the statement accordingly, on March 29, 1912 (fols. 19, 119); and, thereupon, on April 2, 1912, Judge Lacombe, having examined the papers, designated and appointed Judge Mayer to exercise, in the Eastern District of New York, the powers vested in the District Judges of that District (fols. 123-5).

The motion to reopen the application for the extension of the receivership, which was pending at this time, was heard by Judge Mayer on April 11, 1912 (fol. 25). By an order, dated April 22, 1912, Judge Mayer granted a reference to a Special Master to take proof and report, meantime staying the entry of an order upon the opinion of Judge Chatfield (fols. 24-7, 127, 134), after conferring with Judge Chatfield (Return of Chatfield, *J.*, fol. 6).

Since April 2, 1912, all proceedings in the matter of the bankruptcy of the Iron Clad Manufacturing Company have been before Judge Mayer (fol. 30). Prior to that date, the petition shows that some of the proceedings were before Judge Chatfield and some before Judge Veeder (fols. 28-9). In other words, Judge Chatfield did not have sole charge of those proceedings.

THE RETURNS.

I. The Return of Judge Lacombe.

The Return of Judge Lacombe corrects an obvious error (fol. 138) in the copy of the affidavit of Thatcher M. Brown, annexed to the petition, and shows that the order of April 2, 1912, authorizing Judge Mayer to exercise the powers of the District Judges of the Eastern District, in the matter of the Iron Clad Manufacturing Company, was made after an examination of the papers submitted and in the exercise of judicial discretion (fol. 139). Judge Veeder had previously made a request to be relieved from acting further in the matter (fol. 141).

On May 14, 1912, Judge Mayer made an order, directing the petitioners, The American Steel Barrel Company and Elizabeth C. Seaman, to produce before the Special Master certain books and records of the Steel Barrel Company, and, upon their failure to comply with the order, he adjudged them, respectively, guilty of contempt, by orders made on June 14, 1912, and July 3, 1912. Upon the application of the present petitioners, these orders were reviewed by the United States Circuit Court of Appeals (fol. 143), which affirmed the orders of May 14, 1912, and June 14, 1912, but reversed that of July 3, 1912 (201 Fed. 66). In the course of its opinion in that matter, the Circuit Court of Appeals thus referred to the petitioner, Elizabeth C. Seaman (pp. 69, 70):

> "Her own evidence is very unsatisfactory and seems to indicate that no reliance can be placed on any statement she may make; but if her testimony be struck out as untrustworthy, there is no other evidence sufficiently convincing to warrant her imprisonment for contempt. . . . It is quite apparent from this record that throughout this bankruptcy proceeding, Mrs. Seaman has been repeatedly contumacious; when under examination, flippant, defiant, impertinent, evasive and self-contradictory."

No attempt was made to have the United States Circuit Court of Appeals revise the order of April 2, 1912; and that order has been continuously in operation ever since (fol. 145).

II. The Return of Judge Mayer.

Upon the hearing by Judge Mayer, on the motion to reopen the application for the extension of the receivership, the present petitioners appeared and were heard in opposition (fol. 166). Under the order of reference of April 22, 1912, to the Special Master, there have been hearings upon at least fifty days, at which over 2,000 pages of testimony have been taken (fol. 168). Upon these hearings, the present petitioners were represented by counsel (fol. 167).

Not only have these particular proceedings been pending before the Special Master; but various other motions and interlocutory proceedings have been heard before Judge Mayer, some instituted by the Trustee in Bankruptcy, and some by the petitioners themselves (fol. 172); and no objection to the conduct of these proceedings by Judge Mayer was made prior to January 29, 1913, when a motion was made on behalf of the petitioners to compel a substitution of attorneys. Then, for the first time, it was stated that the question of jurisdiction arising out of the designation of Judge Mayer would be raised (fol. 176).

On March 5, 1913, when the order to show cause herein was issued by this Court, the following matters in connection with the bankruptcy proceedings were pending before Judge Mayer (fols. 177–8):

1. An application by the attorneys for the petitioning creditors for an allowance for services rendered in the bankruptcy proceedings;
2. A similar application by counsel for the Receiver;

3. An application to punish the present petitioners for contempt;
4. An application to compel the petitioner, The American Steel Barrel Company, to pay the fine of $2500, imposed by the order of June 14, 1912, and affirmed by the Circuit Court of Appeals;
5. A proceeding, instituted by the present petitioners, to determine the value of the services of the former attorney of the petitioners herein.

Sufficient facts are set forth in the Return of Judge Mayer to show that the American Steel Barrel Company is but a name, behind which Mrs. Seaman is masking, and that the protagonist in this wretched drama is Elizabeth C. Seaman, who has put forth every effort to appropriate to her own use what she herself represented to the creditors of the bankrupt was a valuable asset, going so far as to put the creditors to the expense of establishing the insolvency of the bankrupt in a jury trial, and then carrying the case to the Circuit Court of Appeals after she had filed schedules as an officer of the Iron Clad Manufacturing Company showing its insolvency (197 Fed., 280, 283); and the net assets of that Company, now held by the Trustee, are only about $10,000, as against about $650,000 of liabilities (fol. 174). As Judge Mayer said, in his opinion of June 25, 1912 (fol. 199): "The record shows a persistent course of contumacious conduct and a painful disregard for the administration of justice"; while the statements contained in Mrs. Seaman's affidavits are characterized by Judge Mayer as a "maze of contradiction and evasion" (fol. 200).

Section 21.

Section 21 of the Judicial Code, under which Judge Chatfield was disqualified, is as follows:

> "Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit *and application* are made in good faith. The same proceedings shall be had when the presiding judge shall file with the Clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action."

POINTS.

FIRST.

Jurisdiction of this Court in mandamus proceedings.

I. The jurisdiction of this Court, in mandamus proceedings, is conferred by Section 234 of The Judicial Code, which is as follows:

> "The Supreme Court shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, where a State, or an ambassador, or other public minister, or a consul, or vice consul is a party."

The Section is a re-enactment of Section 688 of the Revised Statutes, the substantial part of which constituted Section 13 of the Judiciary Act.

The power to issue writs of mandamus is exercised by this Court only in cases where it has original or appellate jurisdiction.

In re Massachusetts, 197 U. S., 482;
In re Glaser, 198 U. S., 171.

II.—This Court has neither original nor appellate jurisdiction in the present case. The application should have been addressed to the Circuit Court of Appeals for the Second Circuit, under Section 262 of the Judicial Code, which confers upon that Court the power to issue all writs not specifically provided by statute, "which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law."

SECOND.

Principles applicable to the facts of this case.

I. An application for a mandamus is addressed to the sound discretion of the Court.

Rex *v.* The Mayor of London, 1 T. R., 423, 425-6;
In re Key, 189 U. S., 84, 85.

The petitioner must come into court with clean hands. He cannot acquiesce in an act and subsequently complain of it. He must assert his rights promptly, especially where the rights of third persons are concerned; and the writ will not be issued if its effect might be to cause confusion or disorder or substantial injustice to others.

2 Spelling on Injunctions and other Extraordinary Remedies (2nd ed.), Secs. 138, 1371, 1382;
26 Cyc, 150, 157;
People *v.* Common Council, 78 N. Y., 56, 63;
People *v.* Assessors, 137 N. Y., 201;
Chapman *v.* County of Douglas, 107 U. S., 348;
Duke *v.* Turner, 204 U. S., 623, 629, 631, 632.

And the writ will not ordinarily be issued if it can be issued only by declaring a statute unconstitutional.

26 Cyc, 156.

II. The writ will not be issued where there is another remedy by appeal, writ of error, or otherwise.

26 Cyc, 173;
2 Spelling, Secs. 1369, 1374, 1390, 1392;
U. S. *v.* Addison, 22 How., 174;

Marbury *v.* Madison, 1 Cranch, 137, 169;
In re Conn. Mut. Life Ins. Co., 136 U. S., Appendix, CLXXX;
In re Pennsylvania Co., 137 U. S., 451, 453;
In re Morrison, 147 U. S., 14, 26;
In re Atlantic City R. Co., 164 U. S., 633, 635;
In re Key, 189 U. S., 84, 85.

The writ will not be used to perform the office of an appeal or writ of error, even though no right to review is given.

2 Spelling, Secs. 1373, 1390;
Am. Construction Co. *v.* Jacksonville Railway, 148 U. S , 372, 379;
In re Rice, 155 U. S., 396.

It necessarily follows, that the writ will not issue to correct or review interlocutory proceedings.

In re Atlantic City R. Co., 164 U. S., 633;
In re Huguley Mfg. Co., 184 U. S., 297.

III. The sole function of the writ is to compel affirmative action by one who has refused to perform his legal duty. Mandamus cannot be resorted to to restrain action or to undo an act. Persons who are not required to perform the act are, therefore, not proper parties.

Farrell *v.* King, 41 Conn., 448;
People *v.* Kipley, 171 Ill., 44, 91;
Brooks *v.* State, 162 Ind., 568.

IV. The relator's right to the writ must be clear and absolute. He must show a duty imposed by law upon the respondent, which the respondent has

refused to perform, in violation of some legal right of the relator.

2 Spelling, Secs. 1368–1370;
United States *v.* Blaine, 139 U. S., 306, 319;
United States *v.* Lamont, 155 U. S., 303, 308;
Missouri *v.* Murphy, 170 U. S., 78, 95;
In re Key, 189 U. S., 84, 85.

The writ issues to a judge, to compel judicial action, only when he has wrongfully refused to act.

Ex parte Crane, 5 Pet. 190, 211.

It follows, that the writ can issue only to the person who had failed in his duty; and that person must, of course, have the power to perform the act.

Brownsville *v.* Loague, 129 U. S., 493, 501.

A judge would not be bound to perform an act, if, by so doing, he would violate an order in the matter made by another judge of the same Court.

2 Spelling, Sec. 1378.

V. While this Court may, by mandamus, direct the performance of a judicial duty, it cannot direct or control the exercise of judicial discretion.

Ex parte Crane, 5 Pet., 190, 194;
Ex parte Morgan, 114 U. S., 174;
In re Hawkins, 147 U. S., 486, 490;
Am. Construction Co. *v.* Jacksonville Railway, 148 U. S., 372, 379;
In re Rice, 155 U. S., 396, 403;
Hudson *v.* Parker, 156 U. S., 277, 283.

VI. The powers of the Court in a case of this kind were summed up, with admirable conciseness, by Caldwell, *J.*, in People *v.* Colorado Cent. R. Co. (42 Fed., 638, 640):

> "The writ of mandamus is no longer a prerogative writ, but is now regarded as in the

nature of an action by the relator against the respondent for the enforcement of a legal right or duty, which cannot be fully or adequately enforced in any other mode. It is used only to compel action and enforce the performance of a pre-existing duty. One who invokes its powers must show a clear legal right to have the act performed, and performed in the manner prayed for, and by the person or corporation sought to be coerced. Every fact essential to the exercise of the jurisdiction must be distinctly stated and the relator's right to the relief he seeks must be clearly made to appear by the averments of the petition and alternative writ. It must be made to appear that the writ will be effectual as a remedy, and that the court granting it has the jurisdiction to enforce compliance with its commands. Whether a writ of mandamus shall be issued is in every case a matter resting largely in the discretion of the court, and depends upon all the surrounding facts and circumstances."

THIRD.

No mandamus against Judges Lacombe and Mayer.

The petition must be dismissed as to Judges Lacombe and Mayer, because this Court is not asked to compel either of these Judges to do anything. The petitioners complain of what the Judges have done, not of what they have refused to do. But the acts of the Judges are not before this Court for review; and as this is not a suit of original jurisdiction in equity, there is no power to vacate and set aside any of the orders or decrees referred to in the petition.

FOURTH.

No mandamus against Judge Chatfield.

The mandamus prayed for against Judge Chatfield is (1) to compel him to "sign and enter an order" on his decision of March 15, 1912 (fols. 44–45); and (2), to compel him to "exercise the jurisdiction thereof which he had and was exercising on and prior to the 29th day of March, 1912" (fol. 46).

I. Even if the designation of Judge Mayer to act in the Eastern District was absolutely void, Judge Chatfield could not be compelled to sign and enter an order on his decision of March 15, 1912, because the motion to reopen, which was pending at the time of the entry of Judge Lacombe's order of April 2, 1912 (fols. 16–17, 113–14), has not been disposed of and is still pending. Moreover, by Judge Mayer's order of April 22, 1912, appointing a Special Master, the parties are enjoined from entering an order upon Judge Chatfield's opinion (fol. 134).

II. This Court has no power, in any event, to compel Judge Chatfield to exercise jurisdiction in the matter of the bankruptcy of the Iron Clad Manufacturing Company. There are two District Judges in the Eastern District, Judges Chatfield and Veeder (fols. 28–9). Section 23 of The Judicial Code permits those Judges to agree between themselves how the business shall be divided, and if they fail to do so, the Senior Circuit Judge (and not this Court) is required to direct the division.

The matters growing out of the bankruptcy of the Iron Clad Manufacturing Company have heretofore been disposed of by both of the District Judges (fols. 28–9); and even if it should be held that Judge Chatfield had not been properly disqualified, yet, under all the circumstances of this case, he should

be permitted to exercise his discretion as to whether, for the future, out of respect for the dignity of the Court, he would not prefer to leave the disposition of the Iron Clad matters to Judge Veeder, or to some other Judge to be appointed by the Senior Circuit Judge.

III. By the prayer of the petition, this Court is also asked to direct "the exercise of jurisdiction in said matter of Iron Clad Manufacturing Company and all proceedings incidental thereto and involved therein by the District Judges of the Eastern District of New York" (fol. 46). As this involves the exercise of jurisdiction by Judge Veeder, the other District Judge, and as he is not a party to this proceeding and as it is not claimed that he has failed in his judicial duty, it must be disregarded.

FIFTH.

Petitioners' right to review.

The petitioners will have an absolute right to review, in the Circuit Court of Appeals, any order that may be made in the pending proceeding, upon the coming in of the report of the Special Master; and possibly they have the right to review directly the order appointing the Special Master.

Bankruptcy Act, Secs. 24*b*, 25;
Loveland on Appellate Jurisdiction, Sec. 58;
Potter *v.* Beal, 50 Fed., 860 (C. C. A.);
Am. Construction Co. *v.* Jacksonville Railway, 148 U. S., 372;
Coder *v.* Arts, 213 U. S., 223.

Upon such review by the Circuit Court of Appeals, the validity of Judge Lacombe's order of

April 2, 1912, appointing Judge Mayer, can, of course, be determined; for, if Judge Mayer had no power to make the order, the subsequent proceedings and final order would fall with the order originally made appointing the Special Master. As the right to review in an orderly manner thus exists, that fact alone must defeat this application.

SIXTH.

The petition should be denied in the exercise of the Court's discretion.

Even if the petitioners had shown a clear legal right to a mandamus, it should be denied in the exercise of the Court's discretion.

I. The facts appearing in the moving papers and in the Returns raise a strong presumption of bad faith against the petitioner, Elizabeth C. Seaman, and the corporation controlled by her and held out to the world by her as a mere subsidiary and department of the bankrupt. The very fact that she compelled the creditors to litigate the question of the solvency of the bankrupt (though the assets now held by the trustee do not exceed $10,000, as against $650,000 liabilities; fol. 174), when, by her own schedules, the Company was insolvent (197 Fed., 280, 283), is, in itself, sufficient to cast upon her the burden of affirmatively showing her good faith; and the unsparing denunciation of her conduct, made not only by Judge Mayer but by the Circuit Court of Appeals, can leave no doubt that the present proceeding is but another step in the persistent efforts made by her, during the past two years, to deprive the creditors of the only part of the estate of the bankrupt that has substantial value.

II. There has been a delay of a year in the settlement of this estate, since the order appointing Judge Mayer was made. Very large expense has necessarily attended the hearings before the Special Master, extending over fifty days and involving more than 2,000 pages of testimony (fol. 168), while there have been numerous other proceedings meantime incidental to the general bankruptcy proceedings (fol. 172). The only excuse given for this delay is that the petitioners were not aware of their alleged legal rights (fol. 41); which is no excuse at all, even if they had shown that they had any legal right to a mandamus from this Court.

III. The Returns of Judges Lacombe and Mayer show complete acquiescence by the petitioners in the appointment of Judge Mayer. Not only did the petitioners review, in the Circuit Court of Appeals, three orders made by Judge Mayer (fol. 143); but they appeared in other proceedings before Judge Mayer without objection (fol. 172); and there is now pending before him five matters, one of which was instituted by the petitioners themselves.

IV. To ignore what has been done since the appointment of Judge Mayer and to compel Judge Chatfield to exercise jurisdiction in the bankruptcy proceedings would result in confusion and uncertainty with reference to the proceedings that have been had and are still pending, and would seriously affect the rights of the Trustee in bankruptcy and of the creditors of the estate who are not before the Court.

SEVENTH.

Section 21 of The Judicial Code does not violate the Constitution.

I. In designating Judge Mayer to act in the Eastern District of New York, Judge Lacombe did no more than he had a right to do under Section 23, and no more than is ordinarily done upon the certificate of the Clerk under Section 14, in cases of an accumulation or urgency of business, or under Section 20, where a District Judge disqualifies himself.

II. Unless Section 21 was clearly in contravention of the Constitution, Judge Lacombe was required to designate another Judge to act instead of Judge Chatfield, if, in his opinion, a proper case had been made out for so doing; and, upon such designation, Judge Mayer was required, by Section 19, to discharge the duties of a District Judge in the particular matter referred to him.

III. Section 21 requires an affidavit to be made, stating the facts and reasons for the belief that bias or prejudice exists on the part of the Judge to be disqualified; and the affidavit cannot be filed unless accompanied by a certificate of good faith on the part of counsel. Judge Chatfield approved the formal sufficiency of the affidavit and certificate, in declining to proceed further and in referring the matter to Judge Lacombe:

Henry *v.* Speer, 201 Fed., 869 (C. C. A.);

and Judge Lacombe would not have been authorized to designate another Judge, under this Section, unless, in his opinion, facts were stated in the affidavit showing bias or prejudice, nor unless there was a proper certificate by counsel, nor unless the application was made within the time prescribed by the Statute. The very employment of the term "application", in this Section, indicates that the act is not

an arbitrary one on the part of a complaining party but is an "application" addressed to the discretion of the Senior Circuit Judge; and the Return of Judge Lacombe shows that he examined the papers and appointed Judge Mayer in the exercise of judicial discretion (fols. 139–140).

It is suggested in the petition, that the order of Judge Lacombe was a nullity, because not made within ten days before the beginning of the term (fol. 35). It is doubtful, however, whether that provision would apply to a proceeding in bankruptcy, which necessarily extends over many terms of the court. If, however, it does apply, an excuse was given in the affidavit for the failure to file it within ten days before the following term; and whether or not that excuse was sufficient was also a question to be determined by Judge Lacombe, in the exercise of judicial discretion, with which this Court will not interfere.

Section 21 necessarily applies to actions and proceedings pending at the time The Judicial Code took effect.

Henry *v.* Speer, 201 Fed., 869 (C. C. A.).

That also was a judicial question, however, that could be reviewed only by an appeal or petition to review.

IV. The validity of Section 21 is mainly attacked on the ground that, in conferring power upon a litigant to disqualify a judge arbitrarily, Congress has usurped judicial power.

No arbitrary power is conferred upon the litigant by this statute. He merely has the right to state the facts from which it may be inferred by the Senior Circuit Judge that he cannot obtain an impartial hearing of his case before the Judge appointed to hold the Court. If he makes that fact to appear to the satisfaction of the Circuit Judge, he ought, as a matter of justice, to be permitted to have his case heard by an impartial judge. This

has been recognized from time immemorial, in disqualifying judges who are personally interested in the subject matter of the litigation or whose judgment might be affected by the interests of those related to them by blood or affinity. But the particular cause of the improper influence over the judicial mind is of no consequence. If it in fact exists, the litigant should not be required to submit to it. There is no substantial distinction between the right given to disqualify a judge, where it is limited, as in Section 21, to a single disqualification, and the right conferred upon litigants to challenge jurors for interest, or even peremptorily.

V. Even if Section 21 expressly conferred the arbitrary power upon a litigant to disqualify a judge upon the mere statement, under oath, of the existence of bias or prejudice, without setting forth the facts claimed to show the same, it would not be unconstitutional.

The petitioners state in their petition (fols. 32-3) that Section 21 has been declared unconstitutional and void by the Circuit Court for the Fifth Circuit. Reference is probably intended to the opinion of District Judge Jones, in *Ex parte* N. K. Fairbank Co. (194 Fed., 978). Judge Jones was the judge against whom a charge had been made in that case, and the matter never came before the Senior Judge of the Circuit Court.

VI. Provisions similar to those contained in Section 21 of The Judicial Code exist in a number of the States:

Arkansas: Kirby's Digest (1904), Secs. 4571-4, 2515-9 (Justices of the Peace);
California: Code Civil Proc., Sec. 170;
Florida: Rev. St. (1906), Sec. 1471;
Illinois: Rev. St. (1912), Chap. 146, Secs. 1, 3, 8, 18, 20;
Indiana: Code Civ. Pro., Secs. 255, 257; Code Crim. Pro., Secs. 194, 195;

Kentucky: Ky. Stat. (1909), Sec. 2824;
Louisiana: Code of Prac., Art. 337-342;
Minnesota: Rev. L. 1905, Sec. 4101;
Missouri: Rev. Stat. (1899), Sec. 1760 (Probate Courts);
Montana: Code Civ. Proc., Sec. 180;
North Dakota: Code Criminal Pro., Sec. 292; Justices' Code, Sec. 124;
Ohio: Rev. Stat., Sec. 55;
Oklahoma: Compiled Laws (1909), Sec. 6766;
Oregon: Lord's Oregon Laws, Sec. 45;
South Dakota: Code Criminal Pro., Sec. 292; Justices' Code, Sec. 124;
Utah: Compiled Laws, Secs. 3669, 5132 (Justices' Courts);
Texas: Rev. Civ. Stat. (1911), Art. 2313 (Justices' Court);
Washington: Act March 18, 1911 (Sess. Laws, p. 617), Secs. 1 and 2;
Wisconsin: Rev. Stat., Sec. 2625 (Civil), 4680, 4686*a* (Criminal).

Under some of these statutes, it has been held that the litigant can disqualify the judge arbitrarily, by alleging prejudice, without stating the facts claimed to constitute it. But no decision has been found, under any of them, holding the statutory provisions to be unconstitutional, although the questions arising under them of the exercise of this power have frequently been before the courts.

German Ins. Co. *v.* Landram, 88 Ky., 433;
Vance *v.* Field, 89 Ky., 178;
State *v.* Gray, 100 Mo. App., 98;
State *v.* Montgomery, 160 Mo. App., 724;
State *v.* Clifford, 65 Wash., 313;
State *v.* Palmer, 4 So. Dak., 543;
State *v.* Gardner, 88 Minn., 130;
State *v.* Hoist, 111 Minn., 325;

Lincoln *v.* Territory, 8 Okla., 546;
State *v.* Clancy, 30 Mont., 529, 539;
Knickerbocker Ins. Co. *v.* Tolman, 80 Ill., 106;
McGoon *v.* Little, 7 Ill., 42;
State *ex rel.* Tyrell *v.* Judge, 33 La. Ann., 1293;
State *v.* Kent, 4 No. Dak., 577;
Manly *v.* State, 52 Ind., 215;
Krutz *v.* Griffith, 68 Ind., 444;
Bachmann *v.* City of Milwaukee, 47 Wis., 435;
Rinis *v.* Boyd, 7 Wis., 134;
Cox *v.* U. S., 100 Fed., 293 (C. C. A., 8th Cir., construing Oklahoma Statute);
State *v.* Shaw, 43 Ohio St., 324;
State *v.* Dirlam, 28 Ohio C. C. R., 69;
Conn *v.* Chadwick & Co., 17 Fla., 428;
Purvis *v.* Frink, 55 Fla., 715;
People *v.* Compton, 123 Cal., 403;
Bassford *v.* Earle, 162 Cal., 115.

VII. By Section 8 of Article I of the Constitution, and by Section 1 of Article III, practically unlimited power is conferred upon Congress to establish and abolish inferior courts and to determine their jurisdiction.

Martin *v.* Hunter's Lessee, 1 Wheat., 304, 331;
United States *v.* Union Pac. R. Co., 98 U. S., 569.

In United States *v.* Union Pac. R. Co., Mr. Justice Miller said (p. 603):

> "We say, therefore, that with the exception of the Supreme Court, the authority of Congress, in creating courts and conferring on them all or much or little of the judicial power of the United States, is unlimited by the Constitution."

Where a subject is not expressly covered by constitutional provisions, the legislature can prescribe the jurisdiction of the courts and pass laws governing their procedure.

Wayman *v.* Southard, 10 Wheat., 1, 29;
Livingston *v.* Story, 9 Pet., 632, 656;
United States *v.* Union Pac. R. Co., *supra*;

Thus, Congress may provide for the transfer of cases from one court to another.

Stuart *v.* Laird, 1 Cranch, 299;
United States *v.* Murphy, 3 Wall., 649.

No constitutional rights of litigants are affected by changing the jurisdiction of courts or transferring pending cases.

United States *v.* Union Pac. R. Co., *supra*.

If no constitutional right is impaired by a statute permitting cases to be transferred from one court to another, it is difficult to see why there should be any impairment when a case is transferred from one judge to another, in the same Court. Under what circumstances a Federal judge of an inferior court should be disqualified on the ground of bias or prejudice is necessarily within the power of Congress, which creates the courts and regulates their practice and procedure; and it is no usurpation of judicial power for the legislature to provide that the affidavits of disqualification shall be conclusive as to the facts therein stated; because such a provision is clearly a rule of evidence.

Ky. & I. Bridge Co. *v.* L. & N. R. Co., 37 Fed., 567, 614;
James *v.* Appel, 192 U. S., 129, 136.

As the Supreme Court of Montana said in State *v.* Clancy (30 Mont., 529, 539):

> "It is hardly necessary to say that a party is not deprived of life, liberty or property by

the mere fact that he cannot have his case tried before a particular judge."

It might as well be said that the provision in the the new Equity Rules (Rule 22), permitting a case commenced on the equity side of the Court to be transferred to the law side, is a violation of the rights of the parties.

EIGHTH.

The so-called Traverse.

I. Much of the matter in this so-called Traverse is merely argumentative, and much of it is the assertion of new matter. Both are improper.

II. It would be inconsistent with the dignity due to the courts and their judges, to compel judicial action where a litigant attempts to question the accuracy of the statements contained in the Return of a judge; and it has, consequently, been recognized that such returns are conclusive and cannot be controverted.

People *v.* Judge, Wayne Circuit Court, 23 Mich., 536;
Douglas *v.* Loomis, 5 W. Va., 542;
Cumings *v.* Armstrong, 34 W. Va., 1.

If this Court were at liberty to consider that issues of fact had been raised by this Traverse, that alone would necessarily lead it to deny the application for a writ of mandamus; for it would create a doubt and where there is a doubt, the writ will not issue. The right to it must be clear and the failure of a Judge to perform his duty must be flagrant before the Court will hold him guilty of a breach of duty.

III. Judge Mayer, in his Return, made the statement that the petitioner, Elizabeth C. Seaman, "as the former President and Treasurer of the Iron

Clad Manufacturing Company, and sole owner of its capital stock, and as President and Treasurer of the American Steel Barrel Company, *and former holder of all of its capital stock*", is alone opposing the application to have the assets of the American Steel Barrel Company declared to belong to the Iron Clad Company; that George A. Wheelock had, in December, 1911, filed an affidavit claiming to be the owner of the capital stock of the Barrel Company, but that Wheelock had never personally appeared in Court, and that in April, 1912, his attorney, who had previously entered an appearance for him, applied to the Court for leave to withdraw the appearance and stated that Mrs. Seaman had requested him to make such application; which was refused (fols. 180–2).

In Exhibit A, forming part of the original petition herein, it is averred that on May 24, 1911 (the petition in bankruptcy against the Iron Clad Company was filed on May 23, 1911; petition, fol. 13), *all* of the capital stock of the Barrel Company, except the qualifying shares of directors, stood in the name of Mrs. Seaman, and that she was then President *and Treasurer* of the Company (fols. 57–8). In the same Exhibit, the statement is made, that the said George A. Wheelock claimed to have purchased the capital stock of the Barrel Company at or shortly prior to the filing of the petition in bankruptcy.

The original petition herein was verified by Mrs. Seaman, as President of the Barrel Company (fol. 48).

In the Traverse now served (also verified by Mrs. Seaman, as President), an attempt is made to discredit the accuracy of Judge Mayer's Return, in its statement as to Mrs. Seaman's control of the litigation. This attempt not only totally fails, but it most emphatically confirms the correctness of that Return and makes absolutely clear the bad faith of this petitioner on the present application and throughout the prolonged and costly proceedings in the Bankruptcy

Court. Mrs. Seaman now coolly asserts that for the past two years (since April 14, 1911), she has not owned any of the capital stock of the Barrel Company, except *one* share, and that the owner of all of the stock, except this one share, is George A. Wheelock, who has been in France since April, 1911, which is the reason he has not appeared before Judge Mayer (fols. 49–50); and she does not attempt to controvert the statement that the attorney for this alleged owner of the entire business of the Barrel Company, at her request, asked leave to withdraw the appearance entered on behalf of the alleged owner. It is no wonder that Judge Mayer, in the opinion written by him in April, 1912, stated that this alleged transaction with Wheelock called for some inquiry into the facts (fols. 190–1).

IV. Other indications of Mrs. Seaman's bad faith crop out in this Traverse.

The return of Judge Lacombe showed that the Barrel Company, of which she has been the President and Treasurer, was adjudged to be in contempt, for failure to produce its books, by the order of June 14, 1912 (fol. 143), and that she personally was adjudged to be in contempt for the same reason, by an order made July 3, 1912, and that these orders were reviewed by the Circuit Court of Appeals in December, 1912 (fol. 144), the former order being confirmed, and the latter reversed on the ground that the evidence against Mrs. Seaman as to the books being under her control was not sufficiently convincing (201 Fed. Rep., 66, 69). But now comes Mrs. Seaman into Court, and, in her Traverse, states that the Barrel Company had intended to petition for a remission of the fine imposed upon it, because "*on the night of January 1, 1913, the said books were, by parties unknown to your petitioners, placed in the vestibule of the residence of your petitioner, Elizabeth Cochrane Seaman*, at Number 15 West 37th Street, in the City of New York;" and the books were thereupon delivered to the Bankruptcy Court (Traverse,

plication to open the proceeding and permit testimony to be taken was pending before Judge Chatfield at the time he was disqualified. If he had not been disqualified, it certainly would not have been his duty to enter an order on his previous opinion until he had disposed of that application. If it should be contended that the order made by Judge Mayer on that application is a nullity, then the application itself would still be pending; and, under the joint designation of Judges Chatfield and Veeder of May 22, 1912, Judge Mayer would have the power to formally grant the application and enter a new order to the same effect as his order of April 22, 1912; and the proceedings before the Special Master would then follow, and the parties would undoubtedly stipulate to avail themselves of the evidence heretofore taken. In other words, this Court would not compel Judge Chatfield to proceed, when he and Judge Veeder have duly conferred power upon Judge Mayer to act as Judge in the Eastern District, and when Judge Mayer had acted and is still acting under the power thus conferred upon him.

NINTH.

The application should be denied.

Washington, April 21, 1913.

JOHN A. GARVER,
EDWIN T. RICE,
CHARLES A. RIEGELMAN,
Counsel for Respondents,
Hon. E. Henry Lacombe and Hon. Julius M. Mayer.

EX PARTE AMERICAN STEEL BARREL CO. AND SEAMAN.

PETITION FOR WRIT OF MANDAMUS AND RULE.

No. 14, Original. Argued April 21, 1913.—Decided June 16, 1913.

The proceeding to retire for personal bias or prejudice a trial judge of a United States court from further hearing a case of which he has jurisdiction had its origin in the new Judicial Code, § 21, and is only applicable in rare instances in which not merely adverse, but biased and prejudiced, rulings are shown and facts and reasons given.

Section 21 of the Judicial Code is not intended as a means for a discontented litigant ousting a judge because of adverse rulings, or as a method of paralyzing the action of a judge who has heard the case by disqualifying him between the hearing and the determination of the matter heard.

Quære and not decided whether under § 21, Judicial Code, any affidavit of bias and prejudice is sufficient or whether the judge can pass upon its sufficiency.

The authority of a judge, whose attempted designation under §§ 14 and 21 of the New Judicial Code is beyond the judicial power of the senior circuit judge, may be excepted to; and any order or decree made by him while acting under such designation may be reviewed in due course of law.

The writ of mandamus will be granted by this court only when it is clear and indisputable that there is no other legal remedy.

Where a senior circuit judge in designating under § 14 of the Judicial Code a judge to act in place of one retired under § 21 of the Judicial Code acts in the exercise of his legitimate jurisdiction, this court cannot correct a mistake, if he makes one, by the writ of mandamus.

THE facts, which involve the construction of § 21 of the Judicial Code of 1911 and the jurisdiction of this court to issue writs of mandamus, are stated in the opinion.

Mr. John C. Spooner, with whom *Mr. Aldis B. Browne*, *Mr. Louis O. Van Doren* and *Mr. G. Murray Hulbert* were on the brief, for petitioner.

Mr. John A. Garver, with whom *Mr. Edwin T. Rice* and *Mr. Charles A. Riegelman* were on the brief, for respondents.

MR. JUSTICE LURTON delivered the opinion of the court.

This is a proceeding for a rule on the Hon. Thos. I. Chatfield, District Judge of the United States for the Eastern District of New York, the Hon. Julius Mayer, District Judge for the Southern District of New York, and the Hon. E. Henry Lacombe, Senior Circuit Judge for the Second Judicial Circuit of the United States, to show cause why a writ of mandamus shall not be issued commanding the Hon. Thos. I. Chatfield to resume jurisdiction and

proceed to hear and determine all matters which may arise or have arisen in a certain proceeding pending in the said District Court for the Eastern District of New York wherein the Iron Clad Manufacturing Company has been adjudicated a bankrupt; and directing the vacation of an order made in said case by the Hon. E. Henry Lacombe, as Senior Circuit Judge, on April 2, 1912, designating and appointing the said Judge Mayer, District Judge to hear and exercise in the Eastern District of New York, the same powers that are now vested in the District Judges of said District, or either of them, "*and quashing and setting aside all proceedings in said matter of Iron Clad Manufacturing Co., Bankrupt,* had before said Hon. Julius M. Mayer . . . subsequent to the said order of Judge Lacombe . . . , and especially commanding the said Judge Chatfield to exercise the jurisdiction thereof which he had and was exercising on and prior to the 29th of March, 1912."

A rule to show cause issued, and a return has been made.

The question now is whether a writ of mandamus shall issue.

Shortly stated, the facts necessary to be understood are these:

1. Creditors of the Iron Clad Manufacturing Company, filed on May 23, 1911, a petition in the District Court of the United States for the Eastern District of New York, praying its adjudication as a bankrupt. The proceeding was long contested, but on December 2, 1911, the company was adjudged a bankrupt by Judge Chatfield.

2. In the meantime, controversies had arisen as to what constituted the assets of that company. On June 20, 1911, certain of the creditors filed a petition in the case, charging that the corporate capital, property and assets of another corporation, the American Steel Barrel Company, belonged to the Iron Clad Manufacturing Co., and had been controlled and managed in the interest of the

latter, and praying that the receivership under the proceeding against the Iron Clad Manufacturing Company should be extended to the American Steel Barrel Company.

3. This was bitterly resisted and the independent ownership of the Steel Barrel Company asserted. Elizabeth C. Seaman was the president and manager of both companies, and the nominal owner of all of the shares in each, save a few qualifying shares in the hands of directors. Mrs. Seaman seems to have been not only active in resisting the proceedings against the Iron Clad Company, but also in resisting every claim to the property of the Steel Barrel Company made by the creditors of the Iron Clad Company.

4. The hearing of this application was postponed from time to time and there was disagreement as to whether it should be heard upon affidavits before Judge Chatfield or referred to a commissioner to take proof and report. Finally, on March 15, 1912, Judge Chatfield filed an opinion refusing to extend the receivership to the property of the American Steel Barrel Company, or to take summary possession of its assets, as he had been asked to do. The ground upon which he acted, as shown by his opinion (194 Fed. Rep. 906), was, that the claim to the assets of the Steel Barrel Company was one which should be asserted in a plenary suit. An order in accordance with this opinion was not entered because counsel for the creditors asked for time to make a new application, and such application was made on March 29, 1912, followed, however, on the same day, by the filing of an affidavit under § 21 of the Judicial Code, to prevent further hearing of the case by Judge Chatfield. That affidavit, in substance, alleged that throughout the proceedings in the case, Judge Chatfield had manifested "a strong bias and prejudice against the petitioning creditors and against their counsel, and has shown a strong bias toward Mrs. Elizabeth C. Seaman,

who was and is the sole person interested in the subject-matter of the bankrupt corporation's property other than the creditors."

The motion to rehear the application to extend the receivership was made when District Judge Veeder was holding the bankrupt court and was by him at once referred to Judge Chatfield. In view of the filing of the disqualifying affidavit, Judge Chatfield declined to hear the motion and application to re-open and rehear the motion which had been decided by the opinion handed down on March 15th, and made a certificate in these words:

"UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.

IN THE MATTER OF IRON CLAD MANFACTURING COMPANY, BANKRUPT.	March 29, 1912.

IN THE MATTER OF A MOTION TO REOPEN THE APPLICATION TO EXTEND RECEIVERSHIP, FOR A DIRECTION THAT THE PETITIONERS BE AFFORDED AN OPPORTUNITY TO TAKE TESTIMONY, ETC., AND FOR POSTPONEMENT OF THE ENTRY OF ANY ORDER OR DECREE UPON THE APPLICATION DECIDED MARCH 15, 1912, AND FOR OTHER RELIEF.

Before VEEDER, *J.*

Appearances: Whitridge, Butler & Rice, for petitioning creditors, in support of motion, James A. Allen, specially for Elizabeth C. Seaman and the American Steel Barrel

Co., Emanuel Hertz, specially for George A. Wheelock, in opposition.

Motion respectfully referred to Judge Chatfield.

VAN VECHTEN VEEDER,
U. S. J.

The within application having been referred upon the return day to me Judge Veeder, who called the motion calendar, and the motion papers having been presented by the Clerk, in the presence of James A. Allen, appearing specially, and desiring to be heard in opposition, as attorney for certain parties, Emanuel Hertz, appearing specially for George A. Wheelock, and also desiring to be heard in opposition, and Erskine B. Essig, representing certain creditors, but not taking part in said motion, and no one appearing before me on behalf of the petitioners, but a certain affidavit by Thatcher M. Brown having been brought to the attention of the Court, which affidavit was filed after the motion was referred to me by Judge Veeder and before any of the parties appeared before me, in which the said Thatcher M. Brown, as a party to the proceeding, makes an affidavit that I have a personal bias either against the creditors or in favor of the opposite party to the proceeding, and asking that another judge be designated in the matter prescribed in Section 20, to hear this motion,

I do hereby, in accordance with the provisions of Section 21 of the law known as the Judicial Code, and now in effect, proceed no further in this motion, and order that an authenticated copy of this statement be forthwith certified to the Hon. E. Henry Lacombe, Senior Circuit Judge now present in this Circuit, in order that proceedings may be had under Section 14 of said Act, it being apparent that this motion cannot proceed under section 23, which is prescribed as an alternative method in said Section 21 of said law.

The Court further certifies that it does not make an en-

try upon the records of the Court (nor does it admit) that it has any personal bias or prejudice, but on the contrary might call in question many of the statements or controvert many of the allegations contained in said papers. And this Court feels that if any disqualification exists it was also present when this Court directed a verdict of adjudication and made other decisions in favor of said creditors, and when the Judge now holding the Court upheld the findings of the Special Commissioner as to charges of contempt against Mrs. Seaman.

The Court however feels that the intent of Section 21 is to cause a transfer of the case, without reference to the merits of the charge of bias, and therefore does so immediately, in order that the application of the creditors may be considered as speedily as possible by such Judge as may be designated.

THOMAS I. CHATFIELD,
U. S. D. J."

Thereupon, Circuit Judge Lacombe made the order which it is now sought to have set aside, in these words:

"UNITED STATES DISTRICT COURT,

IN THE MATTER
OF
IRON CLAD MANUFACTURING COMPANY,
BANKRUPT.

Upon the affidavit of Thatcher M. Brown, the certificate of Charles A. Riegelman, Edwin T. Rice and John

M. Garver, Counsel for petitioning creditors and certificate of the Senior District Judge of this District, all filed in this Court on March 29, 1912, and which have been examined by me;

I, E. Henry Lacombe, Senior Circuit Judge of the Second Circuit, under the authority conferred by Section Twenty-one of the Judicial Code of the United States, do hereby designate and appoint the Honorable Julius M. Mayer, District Judge of the Southern District of New York, to have and exercise, in the above entitled proceeding within the Eastern District of New York, the same powers that are now vested in the District Judges of said Eastern District or either of them.

April 2, 1912.

E. Henry Lacombe,
Senior Circuit Judge,
Second Circuit.

Counsel for the respective parties may communicate with Judge Mayer, who will inform them at what time or times it may be convenient for him to hold Court in the Eastern District.

E. Henry Lacombe,
Senior Circuit Judge."

Thereupon Judge Mayer assumed jurisdiction and has since made many interlocutory orders and rulings in the case, to all of which the opposite parties in the proceeding objected and excepted upon the ground that his designation was null and void. Nevertheless, Judge Mayer continued to exercise jurisdiction from the time of his designation in April, 1912, down to the filing of this petition in February, 1913.

The fundamental proposition maintained by the petitioners is that all of the proceedings before Judge Mayer are null and void for lack of jurisdiction and that Judge Chatfield still retains jurisdiction, and that all of the interlocutory orders made by Judge Mayer should be vacated

and Judge Chatfield commanded to proceed with the hearing of the matters pending before him when he refused to proceed further with the case upon the filing of the affidavit objecting to his further exercise of jurisdiction.

The proceeding to retire a trial judge of a United States court from further hearing a case of which he has jurisdiction, had its origin in the new Judicial Code, effective January 1, 1912, and constitutes § 21 of that Code. It is as follows:

"Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein, but another judge shall be designated in the manner prescribed in the section last preceding, or chosen in the manner prescribed in section twenty-three, to hear such matter. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one such affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith. The same proceedings shall be had when the presiding judge shall file with the clerk of the court a certificate that he deems himself unable for any reason to preside with absolute impartiality in the pending suit or action."

The basis of the disqualification is that "personal bias or prejudice" exists, by reason of which the judge is unable to impartially exercise his functions in the particular case. It is a provision obviously not applicable save in those rare instances in which the affiant is able to state facts

which tend to show not merely adverse rulings already made, which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice. It was never intended to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise, but to prevent his future action in the pending cause. Neither was it intended to paralyze the action of a judge who has heard the case, or a question in it, by the interposition of a motion to disqualify him between a hearing and a determination of the matter heard. This is the plain meaning of the requirement that the affidavit shall be filed not less than ten days before the beginning of the term.

The case of *In re Iron Clad Manufacturing Company* had been pending since May, 1911. This affidavit was not filed until March 29, 1912, less than ten days before the April term of the court. In the meantime that company had been adjudged a bankrupt against much opposition, and as the result of a jury trial, and Judge Chatfield had made many interlocutory orders in reference to the bankrupt estate. The principal matter which was then pending before him was the petition of certain creditors of the Iron Clad Manufacturing Company to have the receivership for the property of that company extended so as to include the corporate property of the Steel Barrel Company. This was very earnestly contested. On March 15, 1912, Judge Chatfield handed down the opinion reported in 194 Fed. Rep. 906, denying the application upon the ground that the matter was one which should be asserted by a plenary suit. The order denying that application did not go down, because of the interposition of the motion for a rehearing or to file a new application, on March 29, 1912, while Judge Veeder, another of the judges of the Eastern District, was presiding, which was immediately referred by Judge Veeder to Judge Chatfield. Thereupon and before the latter could act upon it, and on the same

day, the disqualifying affidavit was filed. The action of Judge Chatfield is fully shown by the order and certificate set out heretofore.

We shall not pass upon the timeliness of the affidavit, nor upon the legal sufficiency of the facts therein stated, as affording ground for the averment that "personal bias or prejudice" existed. If Judge Chatfield had ruled that the affidavit had not been filed in time, or that it did not otherwise conform to the requirement of the statute, and had proceeded with the case, his action might have been excepted to and assigned as error when the case finally came under the reviewing power of an appellate tribunal. *Henry* v. *Speer*, 201 Fed. Rep. 869; *Ex parte Fairbank Co.*, 194 Fed. Rep. 978; *Ex parte Glasgow*, 195 Fed. Rep. 780, affirmed by this court in *Glasgow* v. *Moyer*, 225 U. S. 420. But this is not what happened. Judge Chatfield held that the affidavit was sufficient in law to make it his duty to proceed no further. Acting upon that determination he certified his withdrawal and the affidavit to the Senior Circuit Judge that he might, in the exercise of his jurisdiction under § 14 of the new Judicial Code, designate another Judge to proceed with the hearing of the case. It is obvious that if the designation of Judge Mayer under these conditions was wholly beyond the judicial power of the Senior Circuit Judge, his authority to make any order or decree acting thereunder might have been excepted to and thus made the subject of review in due course of law.

The writ of mandamus will be granted by this court only when it is clear and indisputable that there is no other legal remedy. *Ex parte Newman*, 14 Wall. 152, 165; *Bayard* v. *United States*, 127 U. S. 246; *In re Morrison*, 147 U. S. 14.

Judge Lacombe was clearly called upon to determine in the exercise of his jurisdiction as the Senior Circuit Judge, whether the situation was one in which he should designate a Judge in the room and place of Judge Chatfield. He determined the matter adversely to the petitioners. If

in this he made a mistake, it was one made in the course of the exercise of his legitimate jurisdiction under § 14 of the new Judicial Code, and we cannot compel him through a writ of mandamus to undo what has thus been done. *Ex parte Burtis*, 103 U. S. 238; *In re Parsons*, 150 U. S. 150.

Aside from what has been said the long delay in asking the extraordinary remedy of mandamus would fully justify this court in the exercise of a sound discretion in denying relief.

The rule must be discharged.